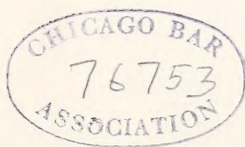


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249 I.A. 633'

VALAREE E. COX,
Appellee,

vs.

YELLOW CAB COMPANY,
a Corporation,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

This appeal is by the defendant from a judgment in the sum of \$5,000 entered upon the verdict of a jury in an action on the case after motions for a new trial and in arrest of judgment had been over-ruled.

Plaintiff filed a declaration in which she alleged that on December 22, 1925, she became a passenger in one of the defendant's taxicabs, and that the driver, a servant of the defendant, criminally assaulted and ravished her while she was such passenger. She asked damages in the sum of \$100,000.

Defendant filed a plea of the general issue and a special plea denying ownership or operation of the taxicab and denying that defendant employed the person who it was alleged committed the assault.

Defendant has argued that the court erred in the giving and refusing of instructions, but these instructions are not set forth in the brief and argument as required by the rules of this court. General Platers' Supply Co. v. Chas. L'Honniedieu Sons Co., 228 Ill. App. 201. We have examined the instructions but do not think that there are any errors disclosed which would require a reversal.

It is also urged that plaintiff's counsel made improper prejudicial arguments to the jury and that the verdict of the jury was excessive, but we do not think there is any merit in

343 I.A. 633

144 - 3174

VALARIE E. COX,
Appellee,
vs.
YELLOW CAB COMPANY,
a Corporation,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

MR. PRESIDING JUSTICE MATTHEW
DELIVERED THE OPINION OF THE COURT.

This appeal is by the defendant from a judgment in the
sum of \$2,000 entered upon the verdict of a jury in an action on
the case after notice for a new trial and in arrest of judgment
had been over-ruled.

Plaintiff filed a declaration in which she alleged
that on December 22, 1928, she became a passenger in one of the
defendant's taxicabs, and that the driver, a servant of the de-
fendant, criminally assaulted and ravished her while she was such
passenger. She asked damages in the sum of \$100,000.

Defendant filed a plea of the general issue and a
special plea denying ownership or operation of the taxicab and
denying that defendant employed the person who it was alleged
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Defendant has argued that the court erred in the
giving and refusing of instructions, but these instructions are not
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220 Ill. App. 201. We have examined the instructions but we do not
think that there are any errors disclosed which would require a

reversal.

It is also urged that plaintiff's counsel made im-
proper prejudicial arguments to the jury and that the verdict of
the jury was excessive, but we do not think there is any merit in

either contention.

The controlling question in the case is whether the verdict and judgment are manifestly against the evidence and whether a new trial should have been granted for that reason.

The plaintiff at the time of the trial was 28 years of age and unmarried. She was born at Heepston, Illinois, and had studied music off and on since she was a child. At one time she worked in Chicago and was quite familiar with the city and its ways. She seems to have had some ambitions in the way of musical attainment and at one time while residing in Chicago underwent an operation for the purpose of correcting bowlegs. Her mother is dead; her father lives somewhere in Ohio.

Her original declaration alleged that at the time of this incident she was a virgin and chaste. An amended declaration omitted this averment, and on the trial she admitted that while unmarried she had lived with one Patrick Callahan in St. Paul, representing herself to be his wife. She also said that she severed her relations with him because he was a dope addict.

This is not her first claim against the defendant. In 1902, while riding in a Yellow cab an accident occurred in which she was slightly injured, and she received the sum of \$25 from the defendant for a release of any claim on that account. In this transaction she gave her name as Valaree Conchan and signed a release by that name.

It seems that she has a grammar school education, attended high school three years, and for a few months attended a university at Valparaiso, Indiana. She worked at the State capitol at St. Paul for three years and for a time was a teacher of the violin in a studio there. She says: "I was sophisticated enough to know my way about, I have been taking care of myself for a long time. I had been associating with men a lot, one man and another

either contention.

The controlling question in the case is whether the verdict and judgment are manifestly against the evidence and whether a new trial should have been granted for that reason. The plaintiff at the time of the trial was 28 years of age and unmarried. She was born at Naperville, Illinois, and had studied music off and on since she was a child. At the time she worked in Chicago and was quite familiar with the city and its ways. She seems to have had some ambitions in the way of musical attainment and at one time while residing in Chicago underwent an operation for the purpose of correcting bowlegs. Her mother is dead. Her father lives somewhere in Ohio.

Her original declaration alleged that at the time of this incident she was a virgin and chaste. An amended declaration omitted this averment, and on the trial she admitted that while unmarried she had lived with one Patrick Callahan in St. Paul, years ago, and that she was his wife. She also said that she covered her relations with him because he was a dope addict.

This is not her first claim against the defendant. In 1907, while riding in a Yellow cab an accident occurred in which she was slightly injured, and she received the sum of \$25 from the defendant for a release of any claim on that account. In this former action she gave her name as Valerius Gordon and signed a release by that name.

It seems that she has a grammar school education, attended high school three years, and for a few months attended university at Valparaiso, Indiana. She worked at the State Capitol at St. Paul for three years and for a time was a teacher of the violin in a studio there. She says: "I was sophisticated enough to know my way about. I have been taking care of myself for a long time. I had been associating with men a lot, one man and another

up in Minneapolis." She also admits that she drank some but she denies that she ever used drugs, in particular veronal.

In the year 1919 plaintiff and Patrick Callahan lived under the representation that they were man and wife with a family named Conchan in Chicago who resided on Wilson avenue. Plaintiff was at that time a cashier at the State and Lake theater. While in St. Paul plaintiff lived for a time with Mrs. Callahan, the mother of Patrick, and when the mother was absent she lived at the Young Women's Christian Association and part of the time at the home of Mrs. Roy Clark. While there she became acquainted with Dr. Gustave Edlund. Mrs. Clark and Dr. Edlund gave evidence tending to show that plaintiff was addicted to an excessive use of veronal. This evidence is denied by plaintiff, by Mrs. Callahan and by the members of the Conchan family with whom plaintiff and Patrick Callahan lived while she was in Chicago. Mrs. Clark also testified that while plaintiff was in St. Paul and at her home, she visited for a time with two women, Charlotte Wolford and Mae Reed; that Charlotte Wolford claimed that she had been attacked in a similar way by a cab driver; that Mrs. Clark, Miss Wolford and Mae Reed talked together about the occurrence and discussed the question of whether the cab company would be liable, and that in that connection Mrs. Clark said to plaintiff, "Why didn't she take a Yellow or a Red Top, a person was certainly foolish to take a private cab like that to come home at that time of night." Plaintiff denies that she ever had knowledge of any such attack made on Charlotte Wolford and denies that any such conversation ever took place in her presence. She also denies the testimony of Dr. Edlund to the effect that he treated her for the effects of an excessive use of veronal.

The evidence shows that plaintiff left St. Paul by railroad train on Monday, December 21, 1925, at 11:30 p. m. and

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denies that she ever used drugs, in particular veronal.
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named Conahan in Chicago who resided on Wilson Avenue. Plaintiff
was at that time a cashier at the State and Lake Theater. While
in St. Paul plaintiff lived for a time with Mrs. Callahan, the
mother of Patrick, and when the mother was absent she lived at the
Young Women's Christian Association and part of the time at the
home of Mrs. Roy Clark. While there she became acquainted with Mr.
Charles Wilford. Mrs. Clark and Mr. Wilford gave evidence tending
to show that plaintiff was addicted to an excessive use of veronal.
This evidence is denied by plaintiff, by Mrs. Callahan and by the
members of the Conahan family with whom plaintiff and Patrick
Callahan lived while she was in Chicago. Mrs. Clark also testified
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for a time with two women, Charlotte Wilford and Mrs. Reed; that
Charlotte Wilford claimed that she had been attacked in a similar
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that she ever had knowledge of any such attack made on Charlotte
Wilford and denies that any such conversation ever took place in
her presence. She also denies the testimony of Mr. Wilford to the
effect that he treated her for the effects of an excessive use of
veronal.

The evidence shows that plaintiff left St. Paul by
railroad train on Monday, December 21, 1920, at 11:30 p. m. and

that she arrived in Chicago the following morning at 11:30 a. m. She was on her way to visit her father in Ohio during the holidays. Before leaving St. Paul she sent a telegram to Mrs. Wilma Hartung, a friend of hers, who resided at 3343 Warren avenue, Chicago, and who was employed downtown; she had known Mrs. Hartung for seven years and at one time lived with her in St. Paul; Mrs. Hartung also used the name Yolande Julianne; her husband at one time lived at this address with her, but she had obtained a divorce. She says she intended to meet plaintiff at the station but went to the wrong one, and plaintiff came to her office in the New York Life building about one o'clock.

Winifred Conchan was employed in a beauty shop on the north side of Chicago, and Mrs. Hartung accompanied plaintiff to an elevated station where she took an "L" train to go to this shop, where she arrived about two o'clock in the afternoon and had a shampo and Marcel. She then went to the home of the Conchan's, arriving there about five o'clock. Genevieve Conchan got home from her work downtown about 20 minutes to six and found plaintiff waiting for her; they had dinner and it appears that plaintiff and Miss Conchan had a habit of exchanging clothes. Plaintiff liked Genevieve's jacket to go with her black dress, and she had a blue coat which Genevieve liked, so they switched for the night. Genevieve says that at this time plaintiff had on a felt hat and a seal skin coat; that she had a brassiere, and she thinks a vest and bloomers, a jersey fastened around the waist with elastic; her dress was of very heavy satin material, black; under her dress she had on bloomers, a brassiere, no chemise. She also had on stockings and shoes. Genevieve says that plaintiff said she was going to Mrs. Hartung's for the night, although she would like to stay where she was. The Conchans, William and Genevieve, together with plaintiff, testified that at about eight o'clock they called a Yellow cab by

phone but it did not come, whereupon Genevieve and William Conohan, the brother, and plaintiff, walked to Sheridan road and Lawrence avenue where they "hailed" a Yellow cab.

William Conohan had been a chauffeur for the Yellow cab company for a time beginning in December, 1931, but was discharged because with others he left his cab in the street and went somewhere to play cards. He says that he had had a few drinks but was not under the influence of liquor, and that was the end of his employment by the Yellow cab company. He says that he and his sister put plaintiff into the cab and gave the driver directions where to take her; that the driver was in the regulation uniform the Yellow cab drivers wore at that time; that he, William, did not pay any particular attention to the number of the cab and was never able to tell definitely just what the number was; he remembers that the corner was well lighted and that the cab was going south when he hailed it and that he told the cab driver to go to 3343 Warren avenue. The cab was one of the new type with the driver's seat enclosed, a built-in cab, not with curtains but with glass; the shades kept him from seeing the driver, but he noticed that he had a stubble of whiskers and that he was between 25 and 30 years of age.

As to the actual occurrence for which plaintiff sues, she is the only witness. She says that when she got into the cab she rode for \$1.95 worth before anything happened to her; that the driver first asked her how she wanted to drive and which way she wanted to go, and that she told him she was not well acquainted with the streets; she does not know how far down they went but they went toward the loop; she says that she knew when she was on Sheridan road all the way until she got to the loop, but she does not remember of coming down into the loop. She does not know where it was that the driver turned off from Sheridan road, but she would say it was three or four miles down, and he then turned off to the

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific information required.

Official Statement of the Board of Directors

RECEIVED BY THE DIRECTOR, FBI, APR 11 1967. (104-10240) (P)

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THE UNIVERSITY OF CHICAGO PRESS

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Approved: _____ Date: _____

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and the other side of the road, the road was very narrow and the traffic was very heavy.

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right; she thinks it was a boulevard, and it was not long after she noticed the meter as showing \$1.95 when the driver turned off the boulevard into a dark street, she thinks it was an alley; she saw the man turn into the alley but did not scream until he stopped; he had gone perhaps a half a block in the alley when he stopped; he handed her a robe and then she says, "I began to scream; I was excited because he handed me the robe; when he told me 'you must be cold,' I did not begin to scream; I was sort of going to try to get out; I pushed against him and tried to get out, tried to push him away; tried to scream. There were no houses around at that time that I can remember." She says she did not see a light at this time but that it was all darkness; that she does not remember seeing police officers and telling them that it happened in a park. When he opened the door she did not jump out but wondered what he was going to do. He said "You must be cold" and then he got in the cab, said he would keep her warm and she started to scream, to fight and kick; she says she noticed he was a white man; he did not kiss her but had his face down by hers and bit her on the neck and breast before he struck her; he was tearing her coat and dress and he hit her on the head; he pinched her all over, pinched her breasts; she could not push him away while she was conscious; when he got hold of her he crushed and hurt her so she could not yell. She does not remember of having seen a club or anything that he hit her with; she had a bump on her head which rendered her unconscious and when she came to she was not far from the house, not more than half a block; she does not know how she happened to be there and she does not know if she rode a couple of miles after that before he let her out; that the driver took hold of her and told her to get the hell out of there; she says she knew at this time that she had been badly treated and had been ravished; when she got on the street she did not scream. The place where he

dropped her off was a populous neighborhood with houses all around which could be seen clearly. She says the reason she did not scream at this time was because she feared the man would kill her. She did not notice whether the taxicab had a number and she did not look at the man to see how he looked; she just wanted to get away from him. She says that the hat she got on the head made it impossible for her to know what she was doing for two or three weeks; she cannot account for the fact that she remembers some things and does not remember others; she does not realize how she got home but remembers getting in the wrong entrance; she, however, went to Mrs. Hartung's home with no assistance from anybody; she did not tell Mrs. Hartung to call anybody or to communicate with the Yellow cab company; she says she does not remember of having seen any policeman or of two policemen coming to see her and getting a statement from her as to what happened; does not remember a man named Trenton getting a statement from her nor of anybody at the hospital to which she was afterwards taken getting a statement from her.

At the Hartung home on this night she was met by Hazel Petrick, who had never seen plaintiff before, and who says that when plaintiff came to the door that night her coat was torn, her hair on the side of her face, her hat on the back of her head and she seemed to be in a daze; that she clung to the side of the door and asked for Wilma Julius, which was Mrs. Hartung's name before she was married. Hazel helped plaintiff as far as the bedroom door and Mrs. Hartung helped plaintiff into the bedroom, telling Mrs. Petrick not to go in with her; then Mrs. Hartung told Mrs. Petrick to call up John Ryan, an attorney, who sometime before had procured a divorce for her. John Ryan is not the attorney who tried the case. Mrs. Hartung's telephone was out of service so Hazel Petrick went to the drugstore to call Ryan; she did not

The first of these is the fact that the defendant is a person of good character and high standing in the community. The second is the fact that the defendant is a person of good character and high standing in the community. The third is the fact that the defendant is a person of good character and high standing in the community.

telephone to anybody else that night, did not tell the druggist anything about it or summon a doctor. The next day Hazel Petrick saw plaintiff and she and Mrs. Hartung helped plaintiff out of bed into the bathtub; plaintiff walked with assistance; she says plaintiff was "pretty badly bruised;" that she had bruises on both arms, four of them on the back of her left arm the size of a man's finger or bigger, another on the inside of the arm as big as a half dollar and a similar bruise on the other arm, a bruise on her head about as big as an orange which stuck up roughly about three-eighths ^{of} an inch; that there were no scratches on her face, but bruises on her neck about as big as a half dollar "black and blue and yellow;" that the left breast had been bit open and she saw teeth marks there; that mark was about an inch or so long and had been bleeding.

Wilma Hartung says that after Mrs. Petrick had tried in vain several times ^{Wilma,} she got attorney John Ryan about 11:30 that night and asked him to tell her what to do; he said to call a doctor; she called Ryan later and told him that she could not get a doctor, and Ryan said he would call one himself; he sent Dr. Roach who came in the afternoon of the next day. The witness took plaintiff to the bedroom and closed the door and undressed her; the dress was torn down the front and a sleeve and pocket were almost ripped out; the brassiere was torn down the front and blood stained; the rubber in the waistband of the bloomers had been ripped out and the bloomers were torn and stained; plaintiff's left breast was badly bitten, the right breast lacerated but not severely, and the laceration on the left breast was circular like teeth marks and oozed blood. Plaintiff's back was scratched as if a hand had been drawn across it; there was a full print of a hand on her arm, thumb and four fingers; her limbs were badly bruised, particularly on the left side and inside of her legs from the thigh down to the ankle. Her stockings

were badly stained; there was blood oozing from the vagina. Mrs. Hartung took these clothes and put them aside in a box but lost them later when she moved, and they were not produced upon the trial; one day later Mrs. Hartung called the police. She says there was a lump on the back of plaintiff's head but she did not notice if it was bleeding. As she says, at the request of plaintiff she did not call the Conchans because plaintiff did not wish them to know of the affair; the Conchans, however, called up on the 23rd of December and came to see plaintiff the following day.

Dr. Roach testified that he was called by Ryan, a lawyer, and examined plaintiff the afternoon of December 23rd; that there was a bump on the left parietal region of the head a few inches above the ear, a bad bruise on the frontal region of the head, bruises on the arm and a deep laceration of the left breast like teeth marks; a contused area on the inside aspect of the right thigh; he made an external vaginal examination which did not reveal any pathological condition; he prescribed absolute rest. She answered his questions intelligently; he found no abrasions or bleeding on the scalp; she seemed very nervous and hysterical; a test showed her eyes normal; he was shown the clothing which had not yet been lost, but was not able to say that there was blood, semen or anything like that on them, and he says, "If it was shown to me that was rather disinteresting to me." Dr. Roach did not treat plaintiff further.

The Conchan family knew about the matter on the 24th and the same day two policemen called. On Christmas day the Conchan girls and the brother came, and they wanted to take plaintiff to the hospital; she was taken to the American hospital on December 27th and was seen there by Dr. Gleits, who called and treated her at the request of the Conchan family; he says he examined her at the hospital and found a lump on her head about two inches above

the ear and about the size of half an egg; that the eyes disclosed double vision; that he found some abrasions on her breast and teeth marks on the left breast; that the abdomen had small bruises scattered here and there and the arms and legs had similar bruises; that she seemed to be in a haze, hysterical, and fine tremors passed through her body; that the muscles were more or less rigid; however, she carried on a fair conversation; he prescribed tablets of allonal as a hypnotic to quiet her; he saw her twice that day and the next morning when he let her go home. This was on December 29th. It had not been suggested to him that perhaps she had been taking a drug so he gave no thought to that matter. He knew that when she came to the hospital she had vomited a yellow, brownish liquid. When out of the hospital she went to the home of the Conchans, on December 29th; she came to his office after that about three or four times. He never prescribed anything else for her; her condition did not indicate to him that she had been taking dope, and that was not suggested to him in any way; he had a history of something else. Veronal, he says, is a hypnotic, coal tar, and he has heard of a veronal "jag." There are people who are veronal addicts, and when veronal is used to a greater extent than in medicinal dosage, it affects the patient by producing a hazy condition. He had seen a veronal jag and had treated people for veronal poisoning and found them "decidedly off their noodle." The users of veronal are hazy but not flighty; when veronal is taken the dose must be increased "to get the kick." He says Dr. Sprigal was the person who took her record at the hospital, but he did not examine the history sheet nor ask for or look at the hospital record. He knew she had vomited at the hospital but no investigation was made to find out what it was. Allonal, he says, to a certain extent has a similar action to veronal which is decidedly a heart depressant. The treatment given plaintiff under his care was as follows: -

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allonal, rest, food and perhaps a bath. He says that a veronal addict after being deprived of the drug for any length of time has nervous twitchings and spasmodic reactions of one kind and another. Anybody can go to a drugstore and buy veronal.

Genevieve Conohan testified that the bump above the ear was about the size of an egg; that there were marks on plaintiff's body, teeth marks on her left breast and black and blue marks on her thighs, but she does not remember the finger prints or anything like that nor the bruises on plaintiff's face. The lump was not accompanied by any bleeding nor evidence of the breaking of the scalp; she says that she felt and saw it, but it was never bandaged as far as she knows; she saw all this while plaintiff was in bed at Mrs. Hartung's, and when she saw plaintiff there she did not have any bandages on nor anything of that sort, although Dr. Roach had been there; she did not have any medicine around at that time, and the witness did not see her taking any treatment at all; plaintiff was at the Conohan home about two weeks after coming back from the hospital and then went to see her father.

Mrs. Conohan and the other Conohan sister did not testify in the case.

Officers Hunt and McMain of the police force visited the plaintiff at the Hartung apartment on December 24th about 3:30 p. m. Officer Hunt testifies that they told her they were police officers and asked her about her trouble; that she at first said that she did not want to tell; that she looked at his partner and said, "I don't like you, you look too mean"; that she then looked at the witness and said, "I will tell you, dearie;" that she then told them that she got into a cab and was attacked somewhere between Sheridan road and Lawrence avenue and her home; that the only description she gave of the man was that "he was tall, slim, sandy haired, light complected man, and he looked like a Swede." They tried to get a further description from her but could not.

After further conversation she told them that two friends had put her in a cab at Sheridan road and Lawrence avenue. Hunt says that plaintiff was not positive where the incident occurred, whether in a park or on a street; that she said it might have happened 200 or 250 feet east of the house where Mrs. Hartung lived; they did not examine her person and no bump was shown on the head. Hunt says he dropped the matter entirely when the policewoman took it up; that McLain and he were plain clothemen.

McLain also testified to the interview with plaintiff at this time, but he did not investigate her wounds; she told him she was marked around the breast and also had a mark on her head.

Policewoman Mrs. Helen Bowden testifies that she interviewed plaintiff at the Conchan home after plaintiff's return from the hospital; that she asked plaintiff if she could describe the man who drove the cab, whereupon she threw herself from one side of the bed to the other and said, "No, he might have been Swedish, and he might have had black hair; I could not describe him." Witness asked what happened in the cab and plaintiff said the driver proceeded to get a blanket to cover her up and then picked up an instrument in the car and hit her on the head; that she became unconscious and he ravished her; that she was thrown out of the cab and walked home. Mrs. Bowden asked plaintiff to let her see the bruises and she says there were bruises on her thighs and breasts, sort of greenish. Plaintiff asked her to feel her head and said, "There is a lump there on my head." Mrs. Bowden felt plaintiff's head but did not feel any abrasion or lump; she says that plaintiff further told her that when the officers came to investigate she had failed to tell them she had been robbed of \$65. William Conchan thought he was quite sure that the number of the cab was 2716, so Officer Bowden went to the garage with Mr. Conchan. Mr. Barry, superintendent, produced the

driver of that cab, who was dark complexioned, but Conohan said he was not the man. The policewoman says that in the presence of the plaintiff she asked Miss Conohan if plaintiff was a married woman and that the reply was no; that she had been horribly lacerated and that several stitches had been taken; that the witness asked if she was compelled to take an anaesthetic, to which she did not reply. Plaintiff claimed to the policewoman that she had an operation at the hospital and had the vagina sewed up, and Mrs. Bowden then asked her about her clothes; plaintiff said she had left them at the Hartung flat. Mrs. Bowden called at Hartung's flat but no one answered the bell; she says that plaintiff told her that she was a virgin and that she was a virtuous woman prior to the time of this assault; that she was from somewhere in Ohio; that plaintiff told her that the man might have had red hair for all she knew.

While at the hospital, plaintiff was interviewed by an investigator for the defendant company. He says that he talked with her and wrote her statement down; she asked him where he was from and he showed her his identification card; she talked to him intelligently and answered questions intelligently. After he had her written statement, he asked her to read and sign it, which she did.

Dr. Maurice Sprigal, who was an interne at the American hospital at the time plaintiff was received there, testifies that on the day following her entrance to the hospital he talked with plaintiff and wrote down her history; he says that she hesitated a little, and it took him a little while. She answered the questions intelligently. He put them down the way she answered them. He had not heard of the case before that time and did not know that she had any claim about having ^{been} assaulted in a Yellow cab. He says that he did not remove her clothing to

examine her. He just lifted up the covers to see the marks of which she complained. She had blue marks on her legs. She had no deformities.

He says (and the history as written at the time corroborates his statement) that plaintiff told him that on the night in question she was assaulted on the street over on Lawrence avenue. He says she was perfectly rational at the time she told him that. This statement gives in detail the birthplace of the plaintiff, the date of her birth, the name of her father, her profession, tells of the fracture of her legs two years before, and it appears from it that the patient stated that on December 22nd, about eight o'clock in the evening, while walking on the street not far from the address given above a man attacked her and threw her down to the ground where she was fighting to escape the attack; that she remained unconscious for a time, she does not remember how long, and that there was bleeding from the vagina two days following the attack; that there were blue marks on her legs and ankles and pain in the pubic region and in both inguinal regions.

On rebuttal plaintiff said that she did not remember having told this story at the hospital; that it was false if she did tell it. She said that she did not remember of seeing the policemen and had no recollection of two policemen coming and getting a statement as to what happened; that she had no recollection of a man Trenton coming and getting a statement as to what happened. She remembers that she was carried into the hospital, but she does not remember having ever seen Dr. Sprigal or that he took her history, although she does not know of anyway he could have found out that her father was living except

examined her. He then lifted up the covers to see the marks of

which she complained. He had first looked at her legs. She

had no marks.

He says (and was directly in position at the time)

repeated his statement) that Plaintiff said that on the

night in question she was assaulted on the breast over on

Lawrence Avenue. He says she was partially rational at the time

she told him that. This statement gives in detail the distance

of the Plaintiff, the date of her birth, the name of her father,

her profession, title of the Plaintiff of her job two years

before, and is signed from it that the Plaintiff stated that on

October 1911, Plaintiff stated in the presence of Plaintiff's

on the street not far from the subject given above a man attacked

her and threw her down to the ground where she was fighting to

escape the attack; that she remained unconscious for a time, she

does not remember her face, and that there was bleeding from the

region two days following the attack; that there were some marks

on her legs and ankles and pain in the pelvic region and in both

lumbar regions.

On Plaintiff's statement that she did not remember

having told this story of the Plaintiff that it was false it was

the fact is. She said that she did not remember of seeing the

police and had no recollection of two policemen coming and

getting a statement as to what happened; that she had no

recollection of a man throwing her down and getting a statement as

to what happened. She remembers that she was carried into the

hospital, but she does not remember having ever seen Dr. [Name]

or that he took her history, although she does not have any memory

he could have found out that her father was living through

through her, as well as other personal matters which appear in the history. However, she remembers that Dr. Cicotte was in the hospital to see her, but she does not recall any treatment. She says she remembers the policeman at the Conchan home, but she does not remember the questions asked as to what the cab driver looked like or of telling her that this man was brunette.

Mrs. Roy Clark of St. Paul testifies that she had known the plaintiff for two years and a half and that for about one year of that time plaintiff had lived with her in St. Paul. She saw plaintiff at her home immediately prior to her journey to Chicago. Plaintiff was ill, and she had been using veronal. She had fallen in the bathtub. The witness called a Dr. Edlund who attended the plaintiff. The doctor told plaintiff to quit using this drug. At one time plaintiff became angry with Mrs. Clark and went to the home of two friends, Charlotte Welford and Mae Reed. Mrs. Clark says that Charlotte Welford made a claim that while she, Charlotte, was a passenger in a taxicab in St. Paul she was ravished by the driver; that plaintiff was at the home of the witness when this happened and that Mae Reed and the witness talked about this in the presence of the plaintiff; that the question of the responsibility of the cab company for such an attack was discussed. Mrs. Clark says that plaintiff complained before she left about a bump on her head and said that she did not know where she got it, and the witness told her that she supposed plaintiff had fallen down after taking veronal again.

Dr. Edlund was also produced as a witness and gave testimony corroborating Mrs. Clark with reference to the illness of the plaintiff, her use of the drug veronal, and his treatment of it for plaintiff.

Plaintiff in rebuttal denied that she had ever been addicted to the use of this drug, denied the testimony of Mrs. Clark as to the condition of her health and as to her complaint about the bump on her head before she left St. Paul. She admitted that she knew Dr. Edlund and said that the doctor did not treat her two or three days before she came to Chicago but "just came to see me." She says that he did not tell her to stop using dope and that she is positive of this. She says that she knew Mae Reed and Charlotte Velford and that she was down at their apartment for a few minutes before going to Chicago; that she took a few drinks with them that night but she did not take any dope and did not fall in the bathtub. She says that she did not tell the policewoman that the chauffeur had robbed her of \$65, but when she came out of the daze she "perhaps had a dollar or so." She does not recall whether Charlotte Velford was supposed to have had a similar experience in Minneapolis in a cab. She says, "I don't remember, I can't remember discussing that three days before I came down to Chicago, and talking about it. * * * I never heard of that incident at all."

It appears that William Conchan expressed the opinion that the number of the cab was 2716. The driver of that cab was produced, however, and Conchan said that he was not the man who drove the cab in which the plaintiff rode at the time in question. There was undisputed evidence offered tending to show that on the particular day on which the assault was claimed to have taken place, several of defendant's cabs had been stolen, and there was also evidence tending to show that similar cabs from outside the city would often be driven into Chicago and that these cannot be distinguished from defendant's cabs. The defendant is a common carrier operating about 9000 cabs in the City of Chicago.

Medical evidence was introduced by the defendant which tends to show that veronal is a crystalline powder which dissolves easily in hot water and will dissolve in alcohol or ether; that it is made ordinarily in tablet form in various medical conditions; that it is synthetic; that it comes from a combination called barbituric acid and has a therapeutic value given in physiological doses to induce sleep; that this physiological dose is from five to fifteen grains; that veronal taken over the usual physiological dose may produce a great many things and it produces profound sleep, unconsciousness; that people susceptible to veronal in small dosage may become delirious, weak, staggering and act as if they are drunk; that in particular a muscle weakness and twisting of the face are pronounced after the use of larger than normal doses; that the addict will see double sometimes and that if the dose is sufficiently large he might go into a profound coma and never come out of it; that several years back veronal was one of the common causes of death of patients that were admitted to institutions of one sort and another; that in large doses it may produce nausea, some vomiting and the like; that some people are very susceptible to it, and that even after a small dose they will see things and will act like a person coming out of a drunk; that they may magnify things they see or see them in an entirely different light; that they may have hallucinations and delusions as a result of using it, although they may have lucid intervals between; that if used for a long period of time or by people who are particularly susceptible to it, veronal makes many patients untruthful, and that after the infliction of a bruise it usually gets red first and then after a day or so changes to a bluish black, blue and then to a yellowish color, and in another twenty-four hours or so to a greenish cast.

National revenue was increased by the following steps:

First, the revenue in a typical year - which is about 100 million - is not used and will therefore be added to the national revenue. It is more difficult in some cases to find a suitable solution.

Second, it is suggested that it should be a common policy to reduce the tax on the production of goods and services in the private sector. This is a very important step in the development of the economy.

Third, it is suggested that it should be a common policy to reduce the tax on the production of goods and services in the private sector. This is a very important step in the development of the economy.

Fourth, it is suggested that it should be a common policy to reduce the tax on the production of goods and services in the private sector. This is a very important step in the development of the economy.

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Sixth, it is suggested that it should be a common policy to reduce the tax on the production of goods and services in the private sector. This is a very important step in the development of the economy.

Seventh, it is suggested that it should be a common policy to reduce the tax on the production of goods and services in the private sector. This is a very important step in the development of the economy.

Eighth, it is suggested that it should be a common policy to reduce the tax on the production of goods and services in the private sector. This is a very important step in the development of the economy.

Ninth, it is suggested that it should be a common policy to reduce the tax on the production of goods and services in the private sector. This is a very important step in the development of the economy.

Tenth, it is suggested that it should be a common policy to reduce the tax on the production of goods and services in the private sector. This is a very important step in the development of the economy.

We have recited this evidence at length from which it must be apparent that the weight of the evidence depends entirely upon the veracity and truthfulness of the plaintiff. The direct charge that is made in this case rests upon plaintiff's testimony alone. The charge is one that might easily be brought by any woman against any cab driver who had driven her about in a city like Chicago. The accused driver has not been identified and is not present to testify. In weighing this evidence, it must be noted in the first place that the circumstances are most improbable and unusual. Plaintiff knew considerable of the City of Chicago and of its ways and customs. According to the story of her witnesses something like two hours elapsed from the time she entered the cab until the time when she says the chauffeur told her to get out of it. The story related by her as to what happened at that time is improbable, and the undoubted injuries which she received are as consistent with several other theories as they are with the one on which her case is based. Why did she permit the driver to drive her about the city instead of taking her directly to the place to which she was going? What instrument would be found in the bottom of a cab with which the driver might strike her on the head? What is there in the description of this bump upon the head which would indicate that any blow sufficient to render her unconscious was in fact struck by an instrument of that kind? Why should this chauffeur after his exceedingly brutal conduct as related by her drive her to the place to which she was bound in a thickly built-up and well-lighted portion of the community where a complaint made by her might have at once led to his arrest and punishment? Moreover, the testimony of some of the witnesses for plaintiff does not ring true. It is a singular circumstance, if plaintiff was as seriously injured as she and her witnesses

"I have received this evidence as I have been told it is
 not an agreement that the father of the witness is guilty
 when the witness and the father of the witness. The witness
 George says it is not in this case that the witness is guilty
 when. The change is one that might easily be made by any
 woman against any man and when she has been told in a city
 this history. The witness is not a person of character and
 is not present in reality. In weighing this evidence, it must
 be taken in the light of the fact that the witness is not
 a person of character. The witness is not a person of character
 of Chicago and of the city and country. In weighing the
 story of her witness something like two years ago from the
 time she entered the city until the time when she was the witness
 told her to get out of it. The story related by her as to what
 happened at that time is impossible, and the witness is not
 what she is now. She is not a person of character and is not
 as they are with her and as which she can be heard. By the way
 permit me to say to the city instead of saying her
 directly to the place in which she was living. That instrument would
 be found in the bottom of a cup with which the witness might make
 her on the floor. That is what is the description of this cup
 upon the floor which would indicate that it was not a person of
 character but a person of character and is not a person of character
 that. The witness is not a person of character and is not a person
 of character as related by her and as to the fact that she was
 found in a fairly well-up and well-known person in the community
 what a complete man of her might have at that time in his house
 and possibly. However, the fact that he was of the witness
 for himself was not a person of character. It is a person of character
 at himself was a person of character and was a person of character

say she was, that a lawyer instead of a doctor was called and that the doctor did not reach her until late on the following day. The clothes, mute but unimpeachable witnesses in a case such as this, were lost, although plaintiff at the time they were lost was acting under legal advice and direction. There is no medical treatment consistent with the alleged injuries sustained, and the plaintiff herself absolutely contradicts the testimony of Wilma Hartung as to the extent of her injuries. The contradictory details, which it is established by the evidence she has given to this extraordinary affair, add much to the improbability of her testimony and is entirely consistent with the conduct which would be expected of a drug addict.

When a woman makes a charge of this kind her own character insofar as chastity is concerned becomes an important issue. The plaintiff averred her chastity in her declaration filed in court, and in her statement made to those to whom she complained, but on the trial she admitted that this was not true. The case rests upon her testimony, and she is impeached by the facts and the circumstances, by her own admissions, by the testimony of the policewoman, the policemen, the physicians, Mrs. Clark and Dr. Edlund, who so far as this record shows are disinterested witnesses. It is not denied that Charlotte Velford alleged a similar experience, and it is highly improbable in view of plaintiff's admission that she visited at Charlotte's home and drank with her and her friends there that she was without knowledge of that alleged affair.

This verdict and this judgment rest upon evidence which is so improbable, so unreasonable and contradicted to such an extent that they cannot stand.

The judgment will therefore be reversed and the cause remanded for another trial.

REVERSED AND REMANDED.

McSurely and O'Connor, JJ., concur.

and the fact that a lawyer friend of a friend was called and that the doctor did not reach her until late on the following day. The doctor, who has unimpeachable character in a case such as this, was told, although I believe it is the fact, that she was not seeing under legal advice and direction. There is no medical testimony whatever with the alleged doctor's statement, and the plaintiff herself, although I believe she is sincere, at times seems to be in a state of confusion. The facts, however, as to the matter of the doctor's visit, which is established by the evidence and has given to this extremely able, and much to be respected, jury of her testimony and is entirely consistent with the facts which would be expected of a busy doctor.

Now a woman makes a charge of this kind but can produce no evidence as to the fact of her being in the house at the time. The plaintiff herself, who is a woman of high character and is in court, and in her statement made to those in whom she confided, but on the trial she admitted that this was not true. The case rests upon her testimony, and she is impeached by the facts and the circumstances, by her own admission, by the testimony of the policeman, the physician, Mrs. Clark and Mr. Nelson, who on this record show are disinterested witnesses. It is not denied that the doctor visited a patient of his, and it is highly probable in view of his city's admission that she visited at the doctor's home and house with her and her friends there that the doctor's testimony at that time is true.

This verdict and this judgment rest upon evidence which is so impressive, so unimpeachable and convincing as to leave no doubt in my mind that they cannot stand. The judgment will therefore be reversed and the case remanded for a new trial.

48 - 31983

FRANCES EVELYN SMITH,
Defendant in Error.

vs.

CARL E. SMITH,
Plaintiff in Error.

249 I.A. 633²
ERROR TO SUPERIOR COURT
OF COOK COUNTY.

MR. HONORABLE JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

On October 3, 1922, the Superior court of Cook county entered a decree granting a divorce in favor of Frances Evelyn Smith from her husband, Carl E. Smith, for his fault. That decree also adjudged and settled the property rights of the parties. There are no children.

The decree finds that subsequent to the determination of the court to enter the same, the parties reached an agreement regarding alimony and property rights. It shows that by consent the wife was to become the sole owner of all furniture, rugs, piano, victrola, and other personal property then in her possession or in storage; that the husband should pay the storage charges on the property up to January 1, 1923, and pay all bills contracted for by the complainant up to the entry of the decree. It was further decreed (by consent of the parties) that the husband should forthwith pay to the complainant the sum of \$3,000 in cash and assign to her a first mortgage for \$6,500 and pay the fees of her solicitor amounting to \$1,500.

29
Likewise by consent it was decreed that the husband should pay to complainant the sum of \$250 on the entry of the decree, and commencing November 11, 1922, and thereafter on the 11th day of each and every month \$250 a month "as long as the complainant lives and remains unmarried."

883 A 1048

10 - 1118

RECEIVED BY THE
DEPARTMENT OF THE INTERIOR

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DEPARTMENT OF THE INTERIOR

RECEIVED BY THE
DEPARTMENT OF THE INTERIOR

On October 2, 1907, the undersigned being at that time
employed as district engineer in the office of the district
engineer at San Francisco, California, the said district
engineer, and advised the undersigned of the fact that
there was no objection.

The undersigned then responded to the fact that
at the time of the survey, the land was owned by the
United States and properly titled. It was then by the
said land to become the sole owner of all interests, and
also, of course, and other interests therein in the
at the time; that the land was then owned by the
United States and was then titled as such.
By the undersigned on the day of the survey. It was
then agreed by the undersigned that the land was then
owned by the United States and was then titled as such.
The undersigned on the day of the survey, and the land of the
United States was then titled as such.

Witness my hand and the seal of the Department of the Interior
at Washington, D.C., this 10th day of October, 1907.
The undersigned, District Engineer, at San Francisco,
California.

The decree also provided that to secure the payment of this alimony the defendant should assign and deliver "certificate, or certificates, for 50 shares of the capital stock of some corporation, to be agreed upon by the parties, to some corporation as Trustee, to be held by said corporation in trust for the purpose of securing the prompt payment of the said sum of \$250 each month to the complainant by the said defendant; that said Trustee should hold said stock as long as said complainant Frances E. Smith should live and be unmarried, except as therein otherwise provided. In the event of her death or remarriage before the death of the said Carl E. Smith, the said stock should be by said Trustee assigned, transferred and delivered to the said Carl E. Smith. In the event of the death of said Carl E. Smith before the death of Frances E. Smith, complainant, (she not having remarried subsequent to the entry of this decree) the said stock should be assigned, transferred and delivered to her, to be her's absolutely, in lieu of the monthly payments of alimony which would accrue if the said Carl E. Smith were living."

The decree further provided that Carl E. Smith should be entitled to the dividends on this stock provided the stock had not been transferred to the complainant for his default; that he should have the privilege at any time to terminate the trust upon paying to Frances E. Smith the sum of \$35,000 in cash, in addition to any alimony due and unpaid, and in that event the monthly alimony provided for therein should cease.

There were further provisions providing for the manner in which Mrs. Smith's interest should be protected in case the defendant defaulted in the payment of the alimony. The decree provided that the provisions for alimony were in full settlement and adjustment of all property rights between the parties and all claims of every kind. This decree was entered upon proofs taken in open court, the defendant, however, offering no testimony.

On May 21, 1926, Mrs. Smith filed her petition in the same cause, reciting at length the provisions of the decree as heretofore stated. The petition averred that upon the entry thereof the husband delivered to the Northern Trust Company certificate No. 113 for 50 shares of the capital stock of the W. W. Kimball Company of the par value of \$100 per share in conformity with the directions of the decree. The petition says that these shares then had a book value of upwards of \$700 a share and that the market value of the same was upwards of that amount. It avers that the Kimball Company thereafter recapitalized and increased its capital stock and issued a stock dividend of approximately 100 per cent; that the effect of this was to decrease and lessen the value of the stock deposited, and that the value of the same at the time of filing the petition was not more than \$230 a share; that the book value did not exceed \$345 a share; that because of the decrease in the value of this capital stock, the value of the 50 shares was not \$35,000 as contemplated by the parties, but did not exceed \$10,000, and was therefore insufficient security.

The petition also averred that the defendant Smith in negotiations preceding the entry of the decree represented that he owned no more than fifty shares of stock in the Kimball Company, and that aside from the mortgage referred to in the decree and the cash which he paid to her, this was all the property he had or could obtain; that his salary was insufficient to pay his obligations; that he had no other property or assets and was insolvent and on the verge of bankruptcy; that these representations were false and untrue, made to deceive and defraud her; that she was induced thereby to make a property settlement for less than she otherwise would have agreed to take.

The petition averred that in addition to the fifty shares deposited, defendant at that time owned 113 more shares

which had a value of upwards of \$700 a share; that he had 20 shares of stock of the Rialto Theatre Company, which was of the value of more than \$200 a share; that instead of being on the verge of bankruptcy, he was possessed of assets of more than \$200,000. Other alleged fraudulent representations as to his financial condition were set up.

The petition also averred that since the entry of the decree the defendant had become the owner of notes secured by a mortgage to the value of \$118,000 and other stocks and securities to the value of upwards of \$100,000; that he was receiving in salary and commissions an income of more than \$18,000 a year; that he was in receipt of interest on a second mortgage of more than \$6,000 a year; that he was in receipt of dividends on the Kimball Company stock of more than \$3,000 a year, and of income from other stocks and bonds of more than \$6,000 a year, and his total income was upwards of \$35,000 a year. Upon information and belief, the petition averred that defendant was worth upwards of \$400,000.

As to her own condition, she averred that she had no other income than the alimony and \$500 a year interest on the balance of cash and the mortgage delivered to her at the time of the entry of the decree; that her total income was less than \$3,500 a year; she averred that during the time of her marriage she maintained a high social position and was accustomed to live in better and more refined conditions in life, but since the entry of the decree she had been receiving the pittance of an income which she was induced to accept because of the fraud and deceit of the defendant, and she had not been able to live in accordance with what was rightfully due her in the social world; that the condition of her health was poor; that the defendant remarried and transferred to his present wife a large amount of property; that the present wife has a dominating and controlling influence over

which had a value of upwards of \$100,000; and as the
value of stock of the Alaska Petroleum Company, which was at the
time of more than \$100,000; and the value of the
value of the company, it was estimated at about \$100,000.
\$100,000. These figures included the value of the
financial position was not.

The position also showed that the value of the
stock of the company had become the subject of a
suspense as to the value of the stock, and the
to the value of the stock of the company, and the
value of the company was estimated at about \$100,000; and
it was in receipt of interest on a second mortgage of \$100,000.
\$100,000 a year; and as the value of the stock of the company
was estimated at about \$100,000 a year, and the value of the
stock and bonds of the company was estimated at about \$100,000
and upwards of \$100,000 a year. When information was received, the
position showed that the company was not in a position to pay
as to the company, the company was not in a position to pay
other income than the company and the company was not in a position to pay
more of stock and the mortgage interest was not at the time of the
entry of the company; that the company was not in a position to pay
a year; the company was not in a position to pay the mortgage and
maintained a high level position and was not in a position to pay
better and more reliable position in the, and since the entry
of the company and had been receiving the interest on the loan
which was not in a position to pay the interest on the loan and the
the company, and the company was not in a position to pay the
which was not in a position to pay the interest on the loan; and the
position of the company was not in a position to pay the interest on the loan
the company was not in a position to pay the interest on the loan

him; that defendant has declared his intention to transfer his property and leave petitioner without proper security or protection.

Her petition prayed that the decree might be modified so that she would receive the amount necessary and proper for her maintenance in accordance with her station in life; that the alimony should become a lien upon defendant's property and that she might have an allowance for counsel's fees; that defendant might be restrained by injunction from transferring his property. Upon the filing of the petition an injunction issued as prayed.

The defendant answering admitted the former proceedings and the deposit of 50 shares of stock, but denied that its value was as alleged; admitted the increase of the capital stock of the Kimball company, the payment of a 51% stock dividend thereon, afterwards a further increase which was a 25% stock dividend, and afterwards a similar 10 per cent stock dividend, and averred the book value of the shares was not \$230 as the petitioner alleged, but \$349.38 per share. He admitted that negotiations preceded the entry of the decree, but denied the allegations of the petition as to fraudulent representations. He also denied the averments as to the amount of his salary and commissions and denied the possession of property of the value as alleged since the entry of the decree.

The answer also denied the jurisdiction of the court to modify the decree upon the basis of fraud or misrepresentation; averred the original decree was a final settlement between the parties, claimed that complainant would not be entitled to relief without restoring the status quo ante which she had not offered to do, and averred that she was estopped by reason of her acquiescence in the decree. The answer also denied the right to an injunction.

that the defendant's wife had been in the house at the time of the murder, and that she had seen the defendant at the time of the murder.

The defendant's wife had been in the house at the time of the murder, and she had seen the defendant at the time of the murder. The defendant's wife had been in the house at the time of the murder, and she had seen the defendant at the time of the murder.

The defendant's wife had been in the house at the time of the murder, and she had seen the defendant at the time of the murder. The defendant's wife had been in the house at the time of the murder, and she had seen the defendant at the time of the murder.

The defendant's wife had been in the house at the time of the murder, and she had seen the defendant at the time of the murder. The defendant's wife had been in the house at the time of the murder, and she had seen the defendant at the time of the murder.

By a further petition, filed July 6, 1926, the petitioner averred that she was in bad health and in need of medical attention; that she on June 3, 1926, sustained a personal injury in being struck by an automobile; that she was without funds to prosecute her petition.

The court heard the evidence and entered a decree increasing the alimony to \$400 a month and directing that the defendant transfer and deliver to the Northern Trust Co. as trustee 53 shares of the capital stock of the Kimball company, being the amount of the stock dividends declared since the entry of the original decree on the certificate which defendant deposited, and that this additional stock deposited be held subject and pursuant to the conditions of the trust agreement, but providing in case the book value of all the stock deposited should at any time exceed \$35,000 defendant might withdraw such excess. The application of the petitioner for the allowance of solicitor's fees was denied. The injunction theretofore issued was modified by dissolving the same except as to 53 shares of the capital stock of the Kimball company, as to which it was continued.

The respondent contends that the court was wholly without jurisdiction to try the issue of whether the petitioner's consent to the original decree was procured by fraud but petitioner asserts that the court had such jurisdiction by reason of section 13 of the Divorce act, which in substance provides that the court may on application from time to time make such alteration in the allowance of alimony and for maintenance, care, custody and support of the children as may be proper.

The subject matter with which this section of the statute deals is not the decree of divorce, but only that part of any such decree as deals with the subjects mentioned in the section. The petitioner here does not ask that the decree of divorce be set

By a further notice, dated July 2, 1935, the notice
 further stated that the same was in fact denied and in fact of record
 attention; that on June 2, 1935, received a personal letter
 in being given by an individual; that the same was given to him in
 presence of his witness.

The same was the witness and entered a check
 thereon. The witness is with a check and recorded that the
 defendant's witness and father is the defendant's father, as
 stated in the record of the capital stock of the defendant's company,
 being the amount of the stock dividends declared since the date
 of the original decree on the certificate which defendant received
 at, and that this additional stock declared to him and his wife
 pursuant to the conditions of the stock agreement, but providing
 in case the total value of all the stock received should at any
 time exceed \$25,000, the defendant should receive such excess. The
 signature of the defendant on the certificate of stock is the same
 was denied. The defendant's father was denied by the
 father the same except as to the amount of the capital stock of the
 defendant's company, as to which it was admitted.

The respondent contends that the court was wrong
 without jurisdiction to try the issue of whether the defendant's
 consent to the capital stock was received by him and his wife
 except that the court had such jurisdiction by reason of section
 12 of the Illinois act, which is a statute providing that the court
 may on application from time to time make such alterations in the
 allowance of alimony and for maintenance, care, custody and
 support of the children as may be proper.
 The subject matter with which the section of the
 statute deals is not the decree of divorce, but only that part of
 any such decree as deals with the subject-matter mentioned in the section.
 The respondent here has not and that the decree of divorce be not

aside for fraud or any other cause. The petition is limited strictly to the subject of alimony, and we think this section must in the very nature of things be construed to make that part of a decree of divorce which provides for future alimony ambulatory. The petition prays only that the decree be modified in that particular respect. People v. Clark, 268 Ill. 136; Fassett Brewing Co. v. Aschler, 300 Ill. 369, and Pyburnall v. Connor, 335 Ill. 360, on which respondent relies, are all distinguishable in this respect. We have given particular attention to Hugo v. Hugo, L. R. A. 1917 F, page 721, which the respondent has discussed at length, but do not find that case to be inconsistent with the views herein announced, since the instant case we think falls within the fifth class of cases enumerated in that opinion, namely, that class of decrees which are subject to modification by express statutory authority. This section of our statute gives power to the court to investigate and determine the proper amount of alimony where there has been a change of circumstance subsequent to the original decree. The fact (if it was a fact) that the consent of petitioner to the amount of alimony incorporated in the prior decree was obtained by false representations could be appropriately investigated by the exercise of the power granted by the statute. Lay v. Lay, 304 Ill. App. 511; Keene v. Keene, 341 Ill. App. 414; Graig v. Graig, 168 Ill. 176; Herrick v. Herrick, 319 Ill. 146.

The case of Smith v. Johnson, 321 Ill. 134, on which respondent relies is not in point, since the court there held that the subject of alimony was not covered at all in the original decree.

The respondent also contends that the court was without jurisdiction to order that additional stock ^{be} deposited by the defendant with the trustee or to modify the trust agreement except by an original proceeding. We think what has already been said must stand

as a sufficient answer to this contention. The statute confers power as full and complete (as long as its exercise is limited to the subject matter of alimony) as the court would have under an original bill.

It is true, the decree provided that the dividends should be paid to the respondent while he was not in default in the payment of alimony, but dividends have been construed by our courts to mean payments made in money as distinguished from stock dividends. DeFeven v. Alcott, 303 Ill. 309; Lancaster Trust Co. v. Mason, 132 U. S. 560; Gram v. Bissell, 79 Conn. 347, 55 Atl. 1056; Billings v. Warren, 216 Ill. 241. Moreover, we think there is merit to the contention that the original decree was not modified in this respect, but on the contrary the original intention as expressed therein was carried out by that part of the order which directed a further deposit of stock. The respondent contends that at any rate the court proceeded upon the wrong theory on this phase of the case; but that is immaterial if it reached the correct conclusion. Merriam v. Merriam, *supra*.

It is further urged that the trustee was a necessary party to this modification. However, the order of modification imposed no additional duties or burdens on the trustee; indeed, the original decree is not in fact even modified in our opinion by this provision.

It is also said that there is no basis for the order in the pleadings. The prayer of the petition was for general relief and the allegations of the petition were broad enough to cover the subject matter of the order appealed from. This was held sufficient in Strave v. Tatge, 245 Ill. 103; Atchison, Topeka & S. P. Ry. Co. v. Stamm, 390 Ill. 428, and Churehill v. Harr, 300 Ill. 306.

The respondent next contends that the injunction which forbade him disposing of the 53 shares of stock in the Kimball company was erroneous in that in effect it granted to the petitioner a lien upon respondent's personal property. He cites Yelton v. Handley, 35 Ill. App. 840; Erismann v. Erismann, 35 Ill. 119; Harris v. Harris, 129 Ill. App. 143; Griswold v. Griswold, 111 Ill. App. 269; Hunter v. Hunter, 131 Ill. App. 390 to this point. The instant case, however, is clearly distinguishable from these in that the property the transfer of which is enjoined, is decreed to be a part of the trust which by the terms of the original decree was created for the benefit of the petitioner.

It is also urged that the original decree awarded alimony in gross and therefore this provision of the decree was not subject to modification. We have already recited the material provisions of the original decree upon this point. The lump sum awarded by the decree was paid at the time or prior to its entry (and this part of the alimony might be regarded as a payment in gross); but the decree further provided for regular payments in installments which were to be paid for an indefinite period of time and for an indefinite total amount. Therefore, that part of the decree modified did not provide for alimony in gross. Plotke v. Plotke, 177 Ill. App. 344.

If we are correct in this conclusion, it of course follows, contrary to respondent's contention, that the petitioner was not estopped by reason of the acceptance of certain benefits under the decree from asking for its modification; and upon the same reasoning equity did not require the petitioner to refund amounts already paid before asserting her right to claim an additional amount of alimony under a modified order.

The controlling question in the case is upon the merits, aside from these merely technical points; that is,

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whether the evidence justified the order granting the prayer of the petition.

The trial court was of the opinion that the evidence failed to establish that the provision of the original decree in regard to alimony was obtained by fraud, and after an examination of the evidence, we do not think that this court can say that such a finding of the trial court is against the manifest weight of the evidence. Both the parties to this litigation prior to the entry of the original decree were represented by able and experienced counsel who also testified in this proceeding.

Mrs. Smith testified that during these negotiations the respondent stated to her that there was a \$50,000 suit pending against him and that if judgment was rendered he would have nothing to give her; that she asked him why he did not give her more stock or money and that he said that he didn't have it. She admitted that at that time she knew of a deal which the respondent had with one Handelsman in connection with the Palace theatre at South Bend and that he had put some money into the enterprise. She further states that at the time of the settlement she believed she had received every particle of assets that her husband had theretofore owned in the world, and that she thinks she was entitled to this.

The respondent admits that he told Mrs. Smith of the pending suit but denies that he stated that he owned only 50 shares of stock in the Kimball company. The attorney for petitioner at that time testified: "I think he said he had 50 shares of Kimball stock," and further that Mr. Smith said there was a judgment or suit against him for \$50,000 and that he was liable to get a judgment against himself which would come in ahead of any claim of Mrs. Smith. He said, "I verified that there was such a suit and we ultimately agreed, as the decree has set out. Mr.

...the position.
The fact that one of the children that the witness
failed to establish that the position of the witness is
regard to himself was obtained by force, and after an examination
of his witness, we do not think that this would be a valid
such a finding of the trial court in regard to the witness's
of the evidence. There was evidence in this case which tends to show
only of the witness's conduct was regarded by him and consequently
concerned who also testified in this proceeding.
Now, which testified that during these negotiations
the respondent stated to her that there was a \$25,000 note which
lay against him and that if judgment was rendered he would have
nothing to live by; that she asked him why he did not live by
more stock or money and that he said that he didn't have it. She
admitted that at that time she knew of a deal which the respondent
had with one Hamilton in connection with the Chicago location of
Bank. Now and then, he had put some money into the enterprise.
The witness stated that at the time of the trial she was followed
she had received every article of apparel that was furnished her
I therefore would be in a worse, and that with things she was
brought to this.
The respondent states that she said that, which is
the general rule and stated that he stated that he owned only
to state of stock in the Hamilton company. "The Hamilton company
stated to him that he testified: "I think he said he had in charge
of Hamilton stock," and witness that he, which was a
statement to said against him that he was liable to
get a judgment against himself which would cover in respect of any
claim of Mrs. Hamilton. He said, "I testified that I never saw a
note and no other thing, and the witness was not able to

Smith stated that his business income had been very much reduced. That is about all I can recollect." He further testified to the effect that the negotiations were long drawn out and that counsel for Mr. Smith submitted to him a list of securities to be deposited as collateral for the payment of whatever Mrs. Smith was to receive in a property settlement. He never, however, investigated the quantity or shares of stock that Mr. Smith had in the Kimball company; he said he had not given any attention or thought to the matter for several years; he said, "It is my impression that he told me he had only 50 shares of the Kimball stock. I couldn't tell you when that was -- it was during the negotiations." He said he did not investigate but had the opportunity to investigate if he wanted to.

The respondent Smith denied having made such representation, and Smith's attorney said that he had a talk with petitioner's attorney with reference to respondent's affairs prior to the entry of the decree in which he told him that respondent was getting a salary ^{of} from \$8,000 to \$10,000 a year, and that he must have 50 or 60 shares of Kimball stock; that he made a memorandum of the securities and handed it to the attorney for petitioner, and he said that sometime afterwards Mrs. Smith's attorney called him up and asked if this was all the stock respondent had in the Kimball company and that he told him no that it was not, and that he had found out that respondent had about 150 shares. This testimony does not appear to be denied by the attorney for the petitioner.

One Jacob Handelsman also gave testimony tending to show that respondent had rented a safety deposit box for the purpose of hiding the stock which he owned from Mrs. Smith, but his testimony is contradicted and his evident ill-will towards the defendant was such that we are not disposed to give much weight to his testimony. It is of course elementary that fraud is never

That is about all I can remember. The witness testified to the
effect that the witness was not sure but that the witness
for Mr. Smith testified to him a list of names of the
as an official for the purpose of the witness. The witness
because in a number of instances, the witness, however, investigated
the identity of names of whom the witness had at the time
because he said he had not given any attention to them at the
within the period of time he said it is up to the witness that he said
as he had only the names of the names of the witness. The witness said
that that was -- it was during the investigation. The witness
he did not investigate but had the opportunity to investigate it
he would do.

The respondent said that having been under
action, and Smith's attorney said that he had a talk with
attorney with reference to respondent's ability to be the party of
the action in which he said that respondent was getting a
relief from \$2,500 to \$10,000 a year, and that he had been in
the office of Smith's attorney that he had a conversation with the
him and stated it to the attorney for settlement, and he said that
respondent afterwards said, Smith's attorney asked him to see
it. This was all the story respondent had in the witness's company and
that he told him he was not, and that he had heard the (that
respondent had about this amount. This amount was not known to
he stated by the attorney for the respondent.

and that respondent also gave testimony during the
that that respondent had wanted a relief amount for the
purpose of having the money when he heard from Smith. But
his testimony is contradicted and his witness is still in doubt
the witness was told that he had listened to the witness with
to the testimony. It is not known whether that is true.

presumed and must always be established by clear and convincing proof. Such degree of proof is not present in this case, and we agree with the chancellor that it was not established.

As to the question of the change in the circumstances of Mrs. Smith since the entry of the decree, the evidence submitted by her tends to show that her financial condition was not as good after the entry of the decree of divorce as it was before, in particular with reference to access to clubs, etc. She also states that she has had two accidents since that time and that at the time of the hearing she was having massage treatment for one of them. Her income consists of the \$250 a month provided by the decree and she receives in addition thereto \$40 a month from the investment of the money which she obtained at the time the decree was entered, so that her total income is \$3400 a year. Upon the question of the change of circumstances of the respondent since the entry of the decree, the parties have submitted two schedules. The one for the petitioner shows that upon the entry of the decree, October 3, 1923, respondent had assets of the value of \$168,513.77, ^{upon} while the date of the filing of the petition, May 21, 1926, his assets were \$253,312.41. On the other hand, respondent submits statements of the same date showing that at the time of the entry of the decree his property was of the value of \$171,928.19, while upon the date of the filing of the petition it was \$172,272.41. A comparison of these two statements discloses that the different results arise out of (1) a difference in the basis of valuation of stock owned by respondent in the W. W. Kimball company, the respondent accepting the depreciated book value of this stock which the Kimball company uses for its own purposes and which the evidence shows was approximately 60 per cent of the actual book value, while the petitioner accepts the actual book value of the stock; (2) the petitioner puts a net value on the South Bend property of respondent on the date of

the decree of \$37,197.43 and a net value on the date of the filing of the petition of \$123,000, while the statement for the respondent places a net value upon that interest on the date of the decree at \$80,000 and the same valuation at the date of the filing of the petition, showing no increase of capital account in that respect.

The valuation on the Kimball stock is that accepted by the company and in fact that which is averred in the petition of Mrs. Smith, and it seems not unfair that such valuation should be accepted. With reference to the interest in the South Bend property we think on the date the decree was entered the valuation was to a large extent speculative. Up to that time Mr. Smith had put \$37,197.43 into that proposition, and it was problematical as to whether he would make or lose on it. It would seem fair to accept the actual net value of the interest at the date of the entry of the decree as the amount of money which he actually put into it. In the suit in the Municipal court which was pending against Smith and Handelsman at the time the decree was entered, a judgment was obtained for \$50,000. Smith undertook to pay this, and in consideration thereof Handelsman delivered to Smith his notes secured by a second trust deed on a leasehold in Chicago for the aggregate amount of \$143,000 and Handelsman also purchased in this transaction Smith's interest in the South Bend property. The trust deed contained provisions whereby Handelsman was entitled to a discount of \$20,000 in the event of prepayment prior to September 1, 1926, and the debtor took advantage of this discount, giving Smith a total sum of \$123,000 instead of \$143,000. However, he was obliged to borrow \$50,000 in order to pay the judgment obtained in the Municipal court, and as there were other expenses and liabilities, such as Attorney's fees, contingent guaranties, etc., it would seem to be a fair estimate that Smith obtained \$70,000 out of the South Bend property. As the original amount invested in that was \$37,197.43, Smith netted approximately a profit of \$32,802.57 in the transaction. Therefore,

it appears that, whereas by the computation of the petitioner respondent at the time the decree was entered was worth, in round numbers, \$165,000 and by defendant's computation \$171,000, he is now worth at least \$200,000, and it also appears that, whereas his income at the time of the entry of the decree was about \$15,000, he now receives over \$20,000.

✓ As respondent points out, decrees of this kind should not be modified for light reasons. If this court were hearing the evidence in the first instance, it possibly would have refused the order to modify this decree. However, that is not the question we are now called upon to decide. On the contrary, we are to determine whether the order entered by the chancellor is clearly and manifestly erroneous. There is a showing here to the effect that Mrs. Smith by reason of her injuries is in need of care and attention, which was not the case at the time the decree was entered. There is a further showing that the husband has had a very substantial increase in the value of property owned by him and of the income received by him since the original decree was entered. Although this case is close upon the merits, we think we are not able to say that the order entered by the chancellor is clearly and manifestly erroneous.

The chancellor denied a further petition of Mrs. Smith for attorney's and solicitor's fees, and cross-errors have been assigned and argued here upon that order. ✓ That there has been conflicting language in the opinions of courts of review of this state in passing upon the question may be conceded. However, it is settled that in the absence of specific statutory authority a court may not require one party to pay the solicitor's fees of another. Section 15 of the Divorce act makes such specific provision for the wife in suits for divorce. This is not a suit for divorce. That suit was terminated by the original decree, and the status of

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husband and wife was severed by that decree which stands unmodified. Both on principle and authority, we think solicitor's fees should not be allowed. Lake v. Lake, 194 N. Y. 170; Lehman v. Lehman, 225 Ill. App. 513; McQuinn v. McQuinn, 61 How. Pr. (N.Y.) 280. See also 19 Corpus Juris 238. However, allowance of counsel fees to a plaintiff for resisting a motion to reduce her alimony was approved in Stillman v. Stillman, 98 Ill. 126, without the citation of authority, and following that decision in Charras v. Charras, 128 Ill. App. 489, the Appellate court approved of an order allowing solicitor's fees to a complainant prosecuting a contempt proceeding for failure of the defendant to pay alimony. In Hazard v. Hazard, 197 Ill. App. 618, this court refused to allow solicitor's fees where a petition had been filed for the purpose of compelling the administrator of the deceased husband to pay alimony. In Gahlbach v. Gahlbach, 219 Ill. App. 503, allowance of solicitor's fees to a complainant prosecuting a petition to modify the original decree for alimony by increasing the amount was reversed because of lack of proof that the fees were reasonable, customary and usual, the court intimating on the authority of Stillman v. Stillman, *supra*, and Charras v. Charras, *supra*, that the order would have otherwise been upheld. However, the interests of minor children were involved in that case, which distinguishes it from the case before us. Thomas v. Thomas, 233 Ill. App. 498, is also distinguishable upon the same ground. At any rate we are not disposed to hold under all the facts which appear in this case, that the court abused its discretion in this respect.

The decree is affirmed.

AFFIRMED.

McSurely, J., concurs.

O'Connor, J., specially concurring: I agree with conclusion but not in all that is said in the opinion.

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SELMA ADAMS,
Appellee,

vs.

E. F. BYRNES,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

MR. PRESIDING JUSTICE MATHNETT
DELIVERED THE OPINION OF THE COURT.

On September 28, 1925, while driving a Ford automobile south on the west side of Glenwood avenue, a public highway in Chicago extending north and south, at the intersection of said avenue with Balmoral avenue, a public highway extending east and west, plaintiff was struck by a Packard automobile owned by defendant and driven by his son Philip, then seventeen years of age. The Packard was being driven in a westerly direction on the north side of Balmoral avenue.

Plaintiff sued and filed a declaration in five counts, the first alleging negligence of defendant generally, the second that defendant by his servant wilfully and wantonly propelled and operated his automobile, the third that defendant had notice of plaintiff's danger and by his servant and agent wilfully and wantonly propelled the automobile, the fourth that defendant drove his automobile at a speed exceeding fifteen miles an hour contrary to the statute, and the fifth that defendant failed to give the right of way to plaintiff at the intersection, contrary to the provisions of the statute.

Defendant filed a plea of the general issue and a special plea that he did not manage, operate or control the vehicle. There was a trial by jury and a verdict for \$12,000 in favor of plaintiff, upon which the court, after over-ruling motions for a new trial and

in arrest, entered judgment.

The following special interrogatory was submitted to the jury: "Was the conduct of the defendant as shown by a preponderance of the evidence, of a reckless character such as to exhibit an utter disregard for the safety and lives of other persons?" The jury replied, "Yes." There was a motion to set aside this special finding, which was denied.

It is urged for reversal that the conduct of the attorney for plaintiff was prejudicial; that a preponderance of the evidence sustained the special plea; that the court erred in its rulings upon the admission of evidence; that plaintiff was guilty of contributory negligence; that the general and special verdicts are against the weight of the evidence; that the instructions are erroneous and the damages excessive.

The undisputed evidence tends to show that plaintiff was then fifty-three years of age; that Glenwood Avenue from curb to curb was 31 feet wide and Balmoral Avenue from curb to curb was about the same distance; that from the curb line on Balmoral on the northeast corner to the building line was about 18 feet; that at the northeast corner there was a three-story apartment building; that the accident occurred between ten and ten thirty of the evening; that it was a clear night; that plaintiff at this time was driving her Ford car south on Glenwood Avenue; that she was accompanied by a friend, Mrs. Nina Mahrenholz; that she was proceeding at a speed of about 12 to 15 miles an hour; that defendant's son was driving a Packard car at this time in a westerly direction at a speed which the witnesses estimated at from 30 to 45 miles an hour; that besides the driver the automobile carried five young people who had been having a social evening together; that when the driver of the Packard was 75 feet or more east of the corner he applied his brakes but his automobile skidded, and in turning to the left to avoid the accident

the front right wheel of the Packard struck the front left wheel of the Ford; that plaintiff received severe injuries, was rendered unconscious and was taken to the hospital that night, where she remained for two weeks and three days; that upon returning to her home she was confined to her bed for a period of about three months and up to the time of the trial was under the care of a physician as a result of the injuries.

Dr. Gould, who attended plaintiff immediately after the accident and while she was in the hospital, testified that he made a physical examination and found that she had a compound skull fracture just over the left eyebrow; that there was a depressed portion of the frontal bone about five-eighths of an inch in diameter; that she had a fracture of the ~~XXXXXX~~ radius of the right arm just below the elbow. Describing the skull fracture, the Doctor said that the skin was broken, and upon lifting the flap of the skin you could look in through the skull and see the coverings of the brain; that the hole was about five-eighths of an inch in diameter; that the treatment given consisted of complete rest and observations; that she suffered from shock at first but was feeling very good; that she had considerable pain from her elbow and also over her left rib, and that she suffered from headache; that she had loss of sensation on the left side of her scalp; that she was a little mentally confused at the hospital, and after the first two weeks became very nervous; that this nervousness manifested itself at first by unusually marked tremor, marked depression, almost melancholia; that when he ceased to treat her December 2, 1927, the tremor was still markedly present. He said he was at the hospital daily, at first twice a day during her observation period, and then daily for a week or ten days, and then saw her at home; that he saw her from seven to ten times, and that a reasonable and customary charge for his services was \$95. He did not have any X-rays taken.

On the 15th of the month of May 1941, the following information was received from the Bureau of the Census, Washington, D. C.:

The patient was admitted to the hospital on 12/15/57, and was found to have a large, well-circumscribed, firm, nontender, subcutaneous mass in the right lower extremity, measuring approximately 10 cm. in diameter. The mass was located in the medial aspect of the right lower leg, just above the ankle. The patient had no history of trauma or other local factors. The mass had been present for several months and had gradually increased in size. The patient was otherwise healthy and had no systemic symptoms. The mass was removed by surgical excision, and the specimen was sent for histopathologic examination. The histologic findings were consistent with a benign soft tissue tumor, specifically a lipoma. The patient recovered well from the surgery and was discharged on 12/22/57.

Dr. Nathaniel H. Adams, testifying as an expert, read certain X-ray pictures of plaintiff's head taken on April 18, 1927, and said that he made a physical examination of plaintiff at that time and found a depression in the left side of the forehead about one inch in diameter, roundish in shape, and that there was a marked tremor of the body which was most marked on the right side; that this was apparent in the hand and legs, very little in the head, and was not the same at all times; that when the plaintiff was quiet the tremor was slight; but that upon exercise it became very marked on the right side; that when she was quiet it was just a fine little shaking of the hand and leg, but upon exertion the shaking became very marked and the hand kept turning inward. He testified that the tremor was objective and absolutely not under plaintiff's control, and in response to a hypothetical question he stated that in his opinion the tremor was the result of the injury received in the accident; that the condition was permanent unless possibly some part of the skull could be removed; that he was not sure that would help any. He also stated that in his opinion the psychological effect of a pending law suit upon the plaintiff would have some effect and might temporarily increase her nervousness.

Dr. Charles Frazier, a medical expert, produced by the defendant, testified that he made an examination of the plaintiff on September 27, 1925; that he found she had an injury to the right elbow, which was swollen, lame and the skin discolored; that this injury "appeared to be a severe sprain, and possibly a minor fracture." He said there was no evidence of any complete fracture or displacement of fragments; that she also had an injury to one side of the chest, he believed the left side; that there was tenderness and that she had difficulty in breathing and some pain when she coughed. He found nothing suggestive of a fractured rib; that that point of injury appeared to be a moderate bruise or contusion with-

out a fracture; that there was a laceration above the left eye near the eyebrow; that at about the middle of the eyebrow there was a piece of skin cut out, like a piece of skin had been punched out, measuring one centimeter, that is less than a half inch in diameter, circular in outline; that on looking down into this punched out wound he could see the bone of the forehead; that there appeared to be a little hole in that bone; that he did not explore with any instrument but did palpate and feel that area; that the skin around the wound was in good condition; that plaintiff had some general muscular soreness from being tossed about; that she complained of her legs being lame, the back a little lame, but there were no physical findings; that at that time she was perfectly rational, with normal respiration; that there had been no change in her temperature and the pulse was good.

Describing the anatomy of the skull close to where he found this opening or abrasion, Dr. Frazier said that the cavity in which the brain lies is pretty well protected on its front aspect because of danger of injury; that the frontal bone is thick; that there are cavities in the frontal bone above the eyes which are known as frontal sinuses, put there as a sort of buffer, adding to the protection the skull gives the brain in the region in which blows are most likely to be sustained; that above these frontal sinuses at the upper part of the forehead, the frontal bone contains no cavities but is quite thick; that it is quite strong and protected; that behind the frontal bone there is the cranial cavity which lodges the brain; that the brain is covered by a membrane; that it is tough dura; that the brain itself is so constructed that injuries in this region are not so serious as they are elsewhere. It was the doctor's opinion that there was no direct injury to plaintiff's brain and there had been no indirect effect of the injury on the brain; that the time of plaintiff's disability was based on the

and a forehead that shows the same character as the rest of the face. The forehead is broad and the hair is dark and wavy. The eyes are deep-set and the nose is straight. The mouth is full and the lips are red. The chin is prominent and the neck is strong. The shoulders are broad and the arms are powerful. The hands are large and the fingers are long. The feet are broad and the toes are thick. The skin is fair and the complexion is healthy. The hair is dark and the eyes are blue. The nose is straight and the mouth is full. The chin is prominent and the neck is strong. The shoulders are broad and the arms are powerful. The hands are large and the fingers are long. The feet are broad and the toes are thick. The skin is fair and the complexion is healthy.

length of time required for a wound of that kind to heal; that there was no infection present and none anticipated, and that a period of from two to three weeks would be sufficient for the recovery of the patient.

A consideration of this evidence as above recited makes it unnecessary, we think, to discuss at length several of the points argued in the briefs. In our opinion we may not say under that evidence that the driver of defendant's automobile was not negligent, that the plaintiff was guilty of contributory negligence or that the damages allowed are excessive.

The defendant argues, however, that the record shows he was not managing, operating or controlling the automobile and that a preponderance of the evidence sustains the allegations of the special plea. The well known and well discussed cases of Arkin v. Page, 237 Ill. 420, Graham v. Page, 300 Ill. 40, and Galas v. Madar, 316 Ill. 319, are cited to this point.

Defendant admits that he was the owner of the Packard car and the license for it was in his name. The driver of the car at the time of the accident was defendant's son, who at that time was seventeen years of age and resided with defendant at his home. Defendant testified that his son Philip asked his permission to use the automobile the night before the accident and defendant asked him where he was going and what he was going to do; that Philip said, "Thy, I am going down to Melville and Clark to Charley Nehl's house;" that defendant asked Philip what he was going to do after that and he replied, "I intend taking a party of about six for a ride;" that defendant said, "No, you cannot," and further said, "Is Mr. Dick, one of the boys in the crowd, going to have his car there?" to which Philip replied yes; that defendant then said, "Well, you can use my car and drive down to that point and leave it there and go out to"

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home;" defendant says that in other words he told Philip that he could take the car to Mehl's place but that they were to go from Mehl's in Dick's car.

The sum and substance of defendant's testimony as developed on cross-examination, was that he gave his son Philip permission to drive the car to Mehl's place and not beyond, but that the boy disobeyed his instructions in this respect. Defendant says that this was either the first or second time Philip ever had the car out at night without some member of the family being with him, but that Philip did sometimes drive the car alone - how many times he could not say; that Philip would take the car at any time he wanted if his mother was there; that he could use it any time his mother was there provided he had permission of his parents; that he had general permission to run the car during the day at any time; that he would always ask because he invariably took the family, defendant's wife or mother-in-law for a ride, and then he would run it to the stores and often drove the car when his father loaned it to him to go to destinations around the town and in Chicago; that the others who drove the car were defendant and another son. The defendant says the car was used "for the pleasure of my family, general use, yes."

Philip testified that his father gave him permission to drive the car to Mehl's house, then go out with a party of young folks in Dick's car, and then drive home again. He says it was the second time his father had let him take the car out alone; that when they got to Mehl's house they decided to go in ^{defendant's} car instead of the other, and he was on the way back to Mehl's home when the accident happened.

An investigator gave some evidence tending to show an admission by defendant that he gave Philip permission to drive the car on the occasion in question, but this conversation is denied by

home; " defendant says that in other words he told Philip that he could take the car to Mel's place but that they were to go from Mel's in Mel's car.

The sum and substance of defendant's testimony as to the trip on cross-examination, was that he gave his son Philip permission to drive the car to Mel's place and not beyond, but that the boy disobeyed his instructions in this respect. Defendant says that this was either the first or second time Philip ever used the car and that witness was under the impression that Philip was driving the car alone - how many times he could not say; that Philip would take the car at any time he wanted it his mother was there; that he could use it any time his mother was there provided he had permission of his parents; that he had general permission to run the car during the day at any time; that he would always ask permission he invariably took the family defendant's wife or mother-in-law for a ride, and then he would run it to the store and often drive the car when his father loaned it to him to go to fishing alone around the town and in Chicago; that the events who drove the car were defendant and another son. The defendant says the car was used "for the pleasure of my family."

General see, see.

Philip testified that his father gave him permission to drive the car to Mel's house, then go out with a party of young folks in Mel's car, and then drive home again. He says it was the second time his father had let him take the car out alone; that when they got to Mel's house they decided to go in Mel's car instead of the other, and he was on the way back to Mel's home when the accident happened.

An investigator gave some evidence tending to show an admission by defendant that he gave Philip permission to drive the car on the occasion in question, but this conversation is denied by

defendant, and is not, in our opinion, entitled to much weight.

We are persuaded it would be a useless labor to discuss the so-called "family purpose doctrine" with reference to the liability of a parent owner for the negligence of a member of his family who drives his automobile. The courts of last resort in the various states have held divergent views, and the decisions in this state have sometimes been by a divided court. The mere fact that the relationship of parent and child exists between the owner and the driver is not sufficient, as we interpret the decisions of this state, to fasten liability for negligence on the parent. The liability arises out of the agency of the driver for the owner rather than upon the family relationship; but it would seem that where an automobile is owned by the father and kept for the use and pleasure of the members of his family, as in this case, that the members of the family who drive the car by permission of the owner for the purpose for which it is kept and used, must be considered agents of the owner and that he is liable for their negligence. Iona v. Kettner, 217 Ill. App. 135; Dawley v. Goldstein, 986 Ill. App. 222; Lambert v. Overeen, 107 La. 224; King v. Smith, 140 Tenn. 217.

We conclude that the defense set up by the special plea was not sustained by the evidence.

It is also urged by defendant that the court erred in permitting physicians to testify that they observed a marked tremor of the body of plaintiff. Dr. Adams, one of the physicians who testified to this, examined plaintiff not for the purpose of prescribing treatments but in order that he might testify. He said that this symptom was objective not subjective; but it is urged the evidence should not have been received. Speiser v. C. C. Ry. Co., 234 Ill. 564; Canoy v. Chicago C. Ry. Co., 127 Ill. 140; Wells Bros. Co. v. Industrial Comm., 306 Ill. 191, and Fold v.

Madison Bldg. Co., 210 Ill. App. 39, are cited and relied on as well as the general rule as stated in 22 Corp. Juris, 671: "and acts of the person under examination, which may have been either voluntary or involuntary, cannot form part of the basis of the opinion."

Both of plaintiff's medical experts testified that the tremor as described by them was involuntary and objective, and they gave in detail the physical facts upon which their opinions were based. There is no evidence in the record tending to contradict these physical facts or to contradict the inferences drawn therefrom by the experts. This being the condition of the record, we think the case is clearly distinguished from those which defendant cites and relies upon. Even if medical testimony tending to show that the symptom described was subjective had been offered and received, it would seem on the authority of Schmitt v. C. S. Ry. Co., 239 Ill. 494, that the matter then would have been for the jury to decide. The opinions of the physicians were not based on statements made by the plaintiff but upon their personal observations of certain objective facts. We think there was no error in this respect.

Defendant also contends that the court erred in that it permitted answers to hypothetical questions based on evidence which should not have been received, but there was only a general objection to these questions insofar as the testimony of Dr. Adams was concerned, and no specific ground for the objection was urged. As to the hypothetical question submitted to Dr. Wernuth, there was an objection that the question invaded the province of the jury. Objections in such cases must be specific. Chicago & N. W. Ry. Co. v. Wallace, 203 Ill. 129; Ill. Central R. R. Co. v. Wade, 206 Ill. 523. The objection that the question submitted to Dr. Wernuth invaded the province of the jury was not valid because

there was no dispute as to the manner and cause of the injury, and the direct question as to whether, in the opinion of the expert, this injury caused the subsequent nervous malady was proper on the authority of Bimrough v. C. & N. Ry. Co., 279 Ill. 71.

It is also urged that the court erred in the giving of instructions, plaintiff's instructions numbers 1 and 2 being similar to instructions criticized in Helvitz v. Chicago L. Trans. Co., 327 Ill. 207. These instructions are not set out in the original brief and argument as required by the rules of this court. General Plaster Supply Co. v. Chas. F. L'Hermiteau Sons Co., 228 Ill. App. 201. In his reply brief, however, defendant has set up these instructions, and they are subject to the objections that in each of them one of the counts of plaintiff's declaration is recited quite at length and the jury told to find for plaintiff if plaintiff has proved this count as alleged. This is bad practice, tending to confuse the jury with legal verbiage rather than to clarify the issues. In a case close upon the facts it would constitute reversible error, but this case is not close upon the facts. As a whole the instructions informed the jury as to the issues and the law applicable. The Supreme court did not reverse for the same error in the case relied on, and we will not reverse here.

Defendant also objects to plaintiff's instruction No. 6, which is as follows:

"The court instructs the jury that while as a matter of law, the burden of proof is upon the plaintiff, and it is for her to prove her case, as explained in these instructions, by a preponderance of the evidence, still if the jury finds the evidence bearing upon plaintiff's case preponderates in her favor, although but slightly, it would be sufficient for the jury to find the issues in her favor and to find a verdict against the defendant."

This instruction was criticized in Helvitz v. Chicago L. Trans. Co., *supra*, but the court did not reverse and the instruction has often been approved by that court as will appear from an examination of Taylor v. Felsing, 164 Ill. 331; Donley v. Dougherty, 174

Ill. 382; Chicago City Ry. Co. v. Fennimore, 199 Ill. 18; C. C. Ry. Co. v. Rundy, 210 Ill. 48; C. C. Ry. Co. v. Nelson, 213 Ill. 443.

If the giving of this instruction is to be held reversible error, it would seem that the Supreme court is the proper tribunal to so hold.

The principal contention of defendant is, however, that the conduct of plaintiff's attorney was so prejudicial to defendant as to require a reversal of the judgment. The conflict in the medical testimony was directed to the question of the nervous tremor of which we have already spoken, its cause and nature. A medical expert for defendant testified, giving evidence tending to show that the excitement of the trial was aggravating the condition of plaintiff and stating that there were a good many people who would be affected in the same way that plaintiff was affected by circumstances attending a trial. The record shows that plaintiff was thereupon called into the court room and stood in front of the jury box, whereupon the following occurred:

"Mr. Finn: Have you seen this woman lately ?(indicating the plaintiff.)

A. I have not.

Mr. Finn: Come up here, please, Mrs. Andersen.

(And thereupon the plaintiff was placed within one or two feet from the front row of the jury box and plainly in view of all the jurors sitting in said jury box, and Mr. Finn, attorney for the plaintiff, then and there, in the presence of the jury, grabbed one of the plaintiff's hands, which were shaking, and he shook said plaintiff's hand up and down, and thereupon the following proceedings took place:)

Q. Do you think a good many people, just because she had a lawsuit, would be doing this? (indicating movements of plaintiff's body as above described.)

Mr. Jacker: I object to that.

Mr. Finn: With this hand?

Mr. Jacker: Objected to.

The Court: He may answer.

Mr. Jacker: He is getting the plaintiff before the jury, exhibiting the plaintiff and having her demonstrate.

The Court: I know; I know; he may ask it.

Mr. Jacker: Exception.

(To which ruling of the court the defendant, by his counsel, then and there duly excepted.)

A. That may be due to other causes.

Mr. Finn: You think a good many people having a lawsuit, because of the psychological effect, would be doing as she is doing now?

1. The first part of the document is a letter from the President of the United States to the Congress, dated January 3, 1862. It is a very important document, as it contains the President's views on the state of the Union and the progress of the war. It is a very long letter, and it is written in a very formal style. It is a very important document, as it contains the President's views on the state of the Union and the progress of the war. It is a very long letter, and it is written in a very formal style.

[illegible]

1. The first thing I noticed when I stepped out of the car was the cold. It was a sharp, biting cold that seemed to penetrate my coat. I shivered as I walked towards the building.

2. The building itself was a large, imposing structure with many windows. Some of the windows were dark, while others were lit up, suggesting that someone was inside. I hesitated for a moment before entering.

3. As I walked through the corridors, I noticed that the floor was polished and shiny. The walls were a light color, and there were several doors along the way. I felt a sense of unease as I moved deeper into the building.

4. Finally, I reached a large room with a high ceiling. In the center of the room was a large, ornate chandelier. Several people were standing around a table, and I saw a man in a suit who looked familiar.

5. I approached the man and introduced myself. He seemed surprised to see me and led me to a small, private office. We sat down at a desk, and he began to ask me questions about my recent activities.

6. I answered his questions as honestly as I could, but I noticed that he was looking at me with a skeptical expression. He seemed to be testing me, trying to see if I was telling the truth.

7. After a few minutes, he stood up and walked towards a door. He opened the door and looked out into the hallway. When he returned, he handed me a small envelope.

8. I opened the envelope and found a piece of paper with some handwritten notes. I read the notes carefully, and they seemed to contain important information. I felt a sense of relief and accomplishment.

9. I thanked the man and left the office. As I walked back towards the car, I noticed that the man was still watching me from a distance. I didn't mind, though, because I knew I had successfully completed my mission.

10. I got into the car and drove away from the building. I felt a sense of freedom and liberation as I drove home. I knew that I had made a difference, and I was proud of what I had accomplished.

(Mr. Finn still shaking plaintiff's hand as above described.)

Mr. Jucker: I object to that question, if the court please.

The Court: Let him answer.

A. That may be due to other causes.

Mr. Jucker: Exception.

(To which ruling of the court the defendant by his counsel then and there duly excepted.)

Mr. Finn: Will you please answer the question? You understand the question?

A. I understand the question.

Mr. Finn: Read the question to him. (Question read.)

Mr. Jucker: I object to that; and I also object to the demonstration before the jury.

The Court: Objection over-ruled. Go ahead.

Mr. Jucker: Exception.

(To which ruling of the court the defendant by his counsel then and there duly excepted.)

(At this point the plaintiff gave an outcry, accompanied by moaning and crying, fainted and sank to the floor at the feet of the jury box and in full view of all the jurors sitting in said jury box.)"

The attorney for defendant then suggested that he wished to make some motions, and the jury were excluded by the court, when attorney for defendant made a motion to withdraw a juror on the ground that the attorney for plaintiff had plaintiff brought in before the jury and had her demonstrate as to her condition, and that when the doctor was testifying and following this demonstration, plaintiff fainted. The motion was resisted by the attorney for plaintiff, who stated that he had not done this purposely and that the testimony showed that plaintiff's movements were involuntary. A further colloquy then occurred between court and counsel, in the course of which attorney for defendant said, "How can we get a fair and impartial trial from the jury after that hideous outcry, your Honor?" The court then said: "It is true, she was standing here moaning and crying, then sinking to the ground, in the presence of the jury." The record shows that the motion to withdraw a juror was denied, and that upon a motion for a new trial defendant urged this as error for which the motion for a new trial should be granted. In the course of that proceeding the attorney for plaintiff, referring to some affidavits which had been filed, said that he had been told that some of them stated something about shaking

the hand or arm of the plaintiff, when the following occurred:

"The Court: You did, too.

Mr. Finn: I merely held it.

The Court: No, you did not.

Mr. Finn: I think the arm shook of itself.

The Court: No, you moved it up and down in your excitement.

Mr. Finn: I merely held it at the elbow; the arm waved of itself.

The Court: No, you did not; I can see you right now at this time.

Mr. Finn: Your Honor realizes that that arm is in motion all of the time.

The Court: So was yours.

Mr. Finn: I merely held it out.

The Court: So was your arm in motion.

Mr. Finn: Well, I knew, your Honor, but I did not consciously move that arm.

The Court: Of course you did not do it consciously, but you did it.

Mr. Finn: My purpose was this, to hold it where the doctor could see it. The woman was holding it down here where he could not see it, and I held it up where he could look at it, because he said he never examined the arm.

The Court: You shook it up and down.

Mr. Finn: I lifted it from her side up to there. (illustrating.)

The Court: I know, and you held it up, and part of the time you waved it up and down.

Mr. Jacker: That was when you said to the witness, 'You mean to say that that is the result of this lawsuit?'---

Mr. Finn (interrupting): That arm was moving itself. I merely lifted it from her side.

The Court: I remember it distinctly, because you were very indignant at the doctor on the witness stand. Perhaps I ought not to have allowed you to go on so far. (Leave given to file the affidavits.)"

Both parties cite and discuss an array of authorities passing upon incidents of this kind. The sum and substance of all of them is, we think, that the action to grant a new trial or withdraw a juror rests in such cases in the sound discretion of the trial judge upon whom rests the duty of seeing to it that every litigant has a fair and impartial trial, and the action of the trial judge will not be reversed in such a case unless his discretion has been abused. There is nothing, of course, in this record to indicate that the conduct of the plaintiff was feigned or was for the purpose of unduly influencing the jury; nor is there anything which would indicate that the attorney for the plaintiff designed to bring about an unfortunate incident such as occurred.

the first 40% of the 1976-77 crop.

[illegible]

It is to be noted that the evidence in this case is entirely circumstantial. The fact that the defendant was seen at the scene of the crime, and the fact that he was seen with the victim, are the only facts which support the charge against him. There is no direct evidence that the defendant committed the crime.

If the case were otherwise, we would not hesitate to reverse. The court of his own motion gave to the jury the following instruction:

"In deciding this case and coming to a verdict you will be controlled by nothing except the law given in these instructions and the evidence introduced upon the trial. Neither prejudice nor sympathy should have the slightest influence upon you. Anything which happened in the court room during the trial which would tend to excite your sympathy and so unduly influence your consideration of the questions in this case must be wholly disregarded by you. You are to coolly deliberate and weigh the evidence and consider the law and find a verdict uninfluenced by anything except the facts in evidence and the law as contained in these instructions."

The defendant, it seems, objected to the giving of this instruction by the court. It seems difficult to reconcile this objection with the theory that defendant really believed he had been prevented from receiving a fair and impartial trial by this incident. Failure to request such an instruction under similar circumstances has been held to indicate that the cause of the defendant, in the view of counsel, has not been injured. West C. St. R. R. Co. v. Waniatta, 169 Ill. 17. The parties to this cause had the benefit of the ruling of an experienced Judge, who, we are satisfied, would not have hesitated to grant the motion to withdraw a juror or grant a new trial if he believed that defendant had been unduly prejudiced.

Defendant also complains that the argument of counsel for the plaintiff to the jury was improper, and in this connection complaint is made of the following statement in his closing argument:

"You can talk about people with broken bones or diseases, but if you had to suffer, or any man had to suffer ---"

Mr. Jacker: Now, I object to that, if the court please.

Mr. Finn: If any man had to suffer --

The Court: Oh, yes.

Mr. Finn: (continuing) --- leave ourselves out of it.

Mr. Jacker: Objected to.

The Court: Objection sustained.

Mr. Finn: ---for one day what she goes through every twenty-four hours of her life, with this nervous trembling, you might have some idea of what real suffering is.

Mr. Jacker: Now I object to that, if the court please.

The Court: I think that is objectionable. I think that that is not putting to the jury anything that is proper for

them to consider, what they themselves would feel.

Mr. Finn: I correct the statement; and I withdraw the statement, what the jury feel themselves.

The Court: You put it in another way; it is the same. Objection sustained.

Mr. Finn: This tremor that you have seen here is constant. It is terrible. It makes you nervous. Now, you think what she must go through. She says it is true; and on excitement it is worse. There is no question about that. But as the doctor says, it is worse on excitement, but it is always there.

And I want to say to you, no sum of money whatever, especially no sum of money within your power to give in this case would ever even partially compensate her for the damage that she has received."

In this point also the matter is one which must be left to the sound discretion of the trial judge subject to review for abuse. So far as the record discloses, a part of this argument was not objected to. As to the other parts objections were sustained by the court and the attorney for plaintiff withdrew the objectionable remarks. It is unnecessary to review at length the cases cited. While the remarks to which objections were made were improper, we think the ruling of the court and the withdrawal of the remarks by counsel prevent us from reversing for this reason.

Defendant also complains that, in the closing argument while discussing the question of negligence, attorney for plaintiff referred to stop lights which stood at the crossing. Objection was made to this on the ground that there was no evidence to show that the city ordinance required stop lights. The objection was overruled by the court, and we think properly.

There is no doubt on this record of defendant's negligence, that the damages are not excessive, that defendant has had a fair and impartial trial. The judgment is therefore affirmed.

AFFIRMED.

O'Connor and McSurely, JJ., concur.

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249 I.A. 684

LEWIS KARRAN,
Appellee,

vs.

CHARLES H. SCHWEPP, BARRETT
WENDELL, Jr., and WILLIAM
McCONNICK BLAIR, Copartners, etc.,
Appellants.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

In an action of assumpsit tried by a jury, there was a verdict in favor of the plaintiff and judgment thereon for \$11,804.16, after motions for a new trial and in arrest had been over-ruled.

The defendants are copartners. Suit was filed November 22, 1934, and Lee, Higginson & Company was named a defendant. The summons commanded that Lee, Higginson & Company should be directed to appear. The declaration consisted of the common counts, to which was attached a copy of the account sued on. The return of the sheriff showed service on Lee, Higginson & Company, "not incorporated. The defendant partners entered a special appearance and moved to quash the service. The motion was granted and it was ordered that Schwepp, Wendell and Blair, doing business under the name of Lee, Higginson & Company, should be made parties defendant. A declaration was thereafter filed complaining of the copartners by that name, jointly with Lee, Higginson & Company, "a corporation." In the course of the trial plaintiff dismissed as to the corporation.

Defendants now contend in this court that the motion in arrest should have been granted on the theory that the plaintiff could not maintain his suit against more than one and less than all of the joint obligors and that plaintiff was not entitled to judgment against the defendants remaining after the corporation had been dis-

missed.

Insofar as the record discloses, this specific objection is raised for the first time in this court, and under such circumstances we would be reluctant to reverse a just judgment for that reason. Tandrup v. Sampell, 234 Ill. 525. Whatever may be the technical merits of such contention, we prefer to put our decision upon another ground going directly to the merits of the case.

The principal contention of the defendants is that the judgment should be reversed because the verdict is clearly and manifestly against the weight of the evidence, and we think this is the controlling question in the case.

The defendant copartners are a bond firm in Chicago, and at the time of the transactions here in controversy did business in the Bookery building. On May 20, 1921, defendants delivered to plaintiff the following receipt:

Received from J. Harmon
Credited on acct.
\$10,000.00

"Lee, Higginson & Co.
Chicago, May 20, 1921. No. 1173.

Lee, Higginson & Co.,
By C. Sawitoski."

Plaintiff at this time had an account with defendants which was opened on May 16, 1921, four days prior to this transaction, at which time he purchased from them at the price of 99, ten \$1,000 Goodyear 8% bonds. Two days later, May 18th, he ordered these sold at 100 $\frac{1}{2}$, realizing a profit of \$114.45. On May 19th he repurchased these ten bonds at the same price. On the 20th he delivered two cashier's drafts to defendants, one drawn on the Continental & Commercial National Bank May 6, 1921, to defendants' order, for \$5,000 and the other drawn on the Illinois Trust & Savings Bank May 7, 1921, to defendants' order for \$5,000. This deposit left a credit balance in plaintiff's account on the books of defendant of \$34.45. Plaintiff, contends, however, that at the same time that he delivered these checks he also deposited with defendants \$10,000.

cash, and his theory is (and he gave evidence tending to show) that this receipt was given for the currency which he alleges he deposited with defendants at that time. We will let plaintiff tell his story largely in his own words.

Plaintiff has lived in Chicago "off and on since 1912." He was born in Virginia and lived in Ohio after he was seventeen; since coming to Chicago he has not been engaged in any active business; he did not have an office anywhere and did not make any office his headquarters downtown in the loop. He owned a farm in Virginia which he sold in 1907 or 1908, and from this he got money to make investments; the amount realized from the sale of this land was about \$38,000; he made investments through his father in Richmond, Virginia, and the father was associated with an uncle who was treasurer of that state; his father died in February, 1920, and after his death plaintiff undertook to invest money for himself. He says that the transaction with defendants was the first attempt he had made to invest his own money; at that time he lived at 6347 Dante avenue and lived at various places thereafter. Sometimes he left a forwarding address for mail upon changing his address and at other times he did not; he does not remember definitely when he first went to the offices of defendants, but he personally visited their offices and purchased ten \$1,000 Goodyear bonds there on April 23, 1921; he does not remember whom he talked to at that time; prior to this time he had done business with another bond house located in another building, and he says that as he remembers, "They ran a board, showing the quotations of the market from time to time during the course of a day." He did not remember seeing such a board in defendants' offices. He says he was at their offices on April 23, 1921, and May 20, 1921, and had never been there since. After his first purchase of bonds he received an invoice showing the transaction, and on the 18th or 19th he gave the order to sell the bonds by telephone but does not know

to whom he talked; that was the first transaction he had ever had with defendants by telephone; he received a bill covering that transaction and the next day ordered the bonds repurchased by telephone; this was on May 19th, and on the following day he says he received by mail a bill or invoice covering that purchase of bonds. Up to May 20, 1931, he had not paid defendants any money or given them any funds, nor had they asked any money or funds from him.

He says that on the day he received this invoice he met his friend, Mr. Thorberson, at the Continental bank in the LaSalle street entrance, which is just opposite the LaSalle street entrance of the Rookery building; it was the usual custom of these friends to eat lunch together; plaintiff says he called Thorberson up that day for that purpose; that that was the usual and customary place where he met him once, three or four times a week, there and in the broker's office adjoining. Plaintiff had been in that broker's office, had gone in there and sat down and watched the board, but it was not there that he "hung out." Plaintiff says that he and Thorberson ate lunch between twelve and one o'clock, and on that day after meeting Thorberson he said to him, "Before we go to lunch, Andy, I am going over to Lee, Higginson to take up some bonds;" he says that his friend went along although he did not ask him to do so; they went together to defendants' offices; he says that he had the invoice of May 19, 1931, and "I had two \$5,000 cashier's checks, and I had ten crisp \$1,000 bills, and I carried all these documents and bills in my pocket; they were all in the same pocket, inside coat pocket.**** As I went in my pocket to get out this invoice, these ten crisp \$1,000 bills and two \$5,000 checks out of my coat pocket, I was standing in kind of sideways position. **** Mr. Thorberson was standing on my right as I took this money and documents out of my pocket, close to me, not right up, hugging up to me. Up until that time I had only said to Mr. Thorberson that I was going over to Lee, Higginson's to take up these bonds. I

handed him the money. Before I took the money out of my pocket, and the \$5,000 checks, I don't remember just what the conversation was.*** As I was standing at what I call the cashier's window, and took the money out of my pocket, and the two \$5,000 drafts, the first thing I did with them after taking them out of my pocket, I handed them over to Thorberson to check them over, to count over the money. I don't know of any reason why I had him to look at the two \$5,000 cashier's checks, I don't remember any reason. I had never done that before with anybody in just that way.*** I did not tell Thorberson at that time that I wanted him to count the money and examine the cashier's checks. The clerk was looking at me while this performance was going on. I had not thought about it at that time, as to whether I distrusted this young man that I was going to turn the money over to.*** I certainly did not distrust them when I was willing to deposit with them. When I turned this money and these checks and this invoice over to the clerk, he went in the back, behind the partition, or into another room, and came back with the receipt and the bonds. I don't remember the details, just what his movements were. I remember distinctly he went back. He left the room that he was in. He passed out of my sight; I did not see where he went to. He was gone five minutes before he returned. I did not see him sign anything. He was a man, a male, not a female.*** I gave the money to this young man; then I learned later on the cashier was a woman. I called up to ask.*** I got the ten \$1,000 bills in Richmond, Virginia. I carried these ten \$1,000 bills from Richmond, Virginia, and ten more on top of them. I got them at Richmond, Virginia, over a year previous to that. When I got them I got them from my father.*** He gave me the ten \$1,000 previous to his death, over a year and a half before he died, and I brought them to Chicago in my pocket. When I got them here I kept them where I keep my private,

personal things, in my pocket. On that occasion I had been carrying around ten \$1,000 bills in my pocket for a year or more before I paid them over to Lee, Higginson & Company. It was not the first occasion I had done that; I did not carry them all that time in my pocket, part of the time in a box; I had a safety deposit box and kept them there part of the time, a very small part of the time, of that year and a half. At the time I turned those bills in to Lee, Higginson & Company they were not all new. I had not used any of them. I kept them in the same condition they were when my father turned them over to me in Richmond. I carried them in my inside pocket; that was not an unusual thing to do. I never told Mr. Thorberson that I was carrying that much money in my inside coat pocket; it was nobody's business."

Plaintiff further says that on May 25, 1921, he directed defendants to sell two of the Goodyear bonds for his account and that he placed this order by telephone. He does not remember from where he telephoned, and on June 8, 1921, he gave an order by telephone for the repurchase of two of the same bonds. This he says was the last time he ever requested defendants to buy or sell for him. He says that he called up on June 1st, that he made a definite memorandum as to when he did call up; the dates he says were June 1st, 8th and 15th. He says that he was surprised that the individual who had signed his receipt was a lady; that at the first conversation, on June 1st, he called up defendants to know what his exact balance was. He did not remember what telephone he used nor whether it was out where he lived or downtown; that he was not downtown every day; he had no business downtown, but was downtown two or three times a week when he went to lunch with Thorberson. He says that when he called up he asked for the bookkeeping department and asked what his exact balance was. He was told twenty odd dollars. He said, "Why, I made a deposit there of

\$10,000, the receipt for which I have." He says he was told he was mistaken. He did not ask any of them their names; that on June 8th he again called the bookkeeping department of defendants and asked about his account; that a man again answered the 'phone but he was not able to say whether he was the same man who answered it the first time, and he did not ask the man what his name was. He does not remember what telephone he used but his best memory is that he called from the Illinois Trust & Savings bank. At this time he asked the young man if he was not mistaken about plaintiff's balance, and the man replied, "no," and plaintiff said that there must be some mistake about it; that the man said there was not and the conversation ended about that time. He called up again June 15th according to his memorandum. He cannot remember whether he talked with the same man as on the previous occasion and he did not ask him his name. He called during the morning of the 15th and doesn't remember whether he called from where he lived or after he got downtown. He had the identical conversation with this young man in the bookkeeping department as he had before. He had no conversation with anybody connected with defendants after that time until about July 16, 1924. He says he was surprised to be informed three times, on June 1st, 8th and 15th, 1921, that he had only a small balance of twenty odd dollars when he had deposited \$10,000 and should have had that to his credit. He was dumbfounded but did not ask the name of the man he was talking to. The Illinois Trust & Savings Bank was next door to defendants in the same building but he did not walk over and make a more definite inquiry. He says that would not change their records on the books. He met Mr. Thorberson on those three occasions. He was not satisfied but did not make any further inquiry.

A part of his cross-examination on this point is as follows:

Q. Why didn't you bring to Lee, Higginson & Company your receipt for the \$10,000 and your receipted bill, and show it to someone? Why didn't you do that? A. I had the receipts.

Q. Well, why did you not bring them into them and show the receipts and show them 'I paid you \$10,000 on May 20th and you deny receiving it?' A. And get mixed up in a conversation there?

Q. Is that the reason you did not go? A. And get mixed up in a conversation?

Q. You had never got mixed up in a conversation with them before, had you? A. Because I had all the conversation over the telephone.

Q. And you were satisfied to talk with some one, you did not know who it was, and you did not ask his name? A. It was not a matter of being satisfied. It was a matter of doing the best I could under the circumstances. I had no lawyer at that time.

Q. You had no transaction with Lee, Higginson & Company prior to that date that would raise your suspicion of their not being honest, did you? A. I was checking up the mistake.

Q. Did you have any transaction with them prior to that date, to indicate they were dishonest? A. I had not.

Q. No, and you expected you might get satisfaction if you went there with your receipted bill and invoice? A. When I had been told three times there was no record?

Q. Yes, but you had in your pocket a record of it. Why didn't you show it to them? A. That did not change their record any. I had their record.

Q. It might convince them. A. I had their record. The time to convince them was the time I demanded it.

Q. All right. Then you waited three years, didn't you, before you talked to them again over the 'phone? A. That account was still alive.

Q. Yes, but you waited three years from that date before you had a conversation with them again over the telephone, or any conversation with them, didn't you? A. According to the records I waited that long.

Q. Well, it is the truth, isn't it? A. I say, according to the records I waited that long.

Q. Yes. Well, it is the truth, isn't it? A. I say, according to the records I waited that long.

Q. Well, what records are you talking about? Your own?

A. The records -- yes, my own.

Q. Yes; did you tell Mr. Thorberson on June 1st or June 8th or June 15th, 1921, that you had this dispute with Lee, Higginson & Company regarding your \$10,000 deposit? A. I told him---

Q. Did you on any of those three occasions, after you had talked to them, tell him what you had talked with Lee, Higginson & Company? A. I did, later.

Q. I am asking you, on those dates. You say you went out to lunch with him on the 1st of June, the 8th of June, the 15th of June, 1921, after you had these three conversations and they disputed the amount of your balance. Did you tell him on those occasions? A. I certainly did tell him they did not show that deposit.

Q. Did you hear Mr. Thorberson testify here yesterday?

A. Yes, I did.

Q. Did you hear him testify you had not told him anything about it? A. I---

Q. Did you hear him say that yesterday? A. I told him about it later. I called his attention to it. I asked him if he remembered the transaction.

Q. No, I am asking you, did you tell him on either of those three different occasions - the first, the eighth or the fifteenth of June, 1921? A. I don't remember just what date I told him."

On July 1, 1921, plaintiff had a man named Quinlan take \$500 in currency to defendants and deposit it to his account. He met Quinlan that day in the lobby of the Corn Exchange Bank building. The Corn Exchange Bank building was on the northwest corner of Adams and LaSalle streets, just "kitty-corner" across from the Reekery building. He met Quinlan that morning by appointment and had called him up on the telephone for the definite purpose of making this \$500 deposit. He says he preferred having Quinlan because it was his privilege to have him do it and because he wanted "to see their form of receipt they gave to somebody else making a deposit;" that he sent the money over by this man to see whether he would get the same receipt he got.

It is uncontradicted by the record that the first demand made by plaintiff on defendants was by letter from his then attorney on August 12, 1924. Plaintiff was not able to produce the invoice which he says he received and which was stamped paid. He says he regarded this invoice as of no value and discarded it with other papers, threw it in the wastebasket, about three weeks after the transaction.

In material parts of his testimony plaintiff is corroborated by the testimony of his friend Thorbertson, who describes his business as "commercial agent of the Mobile & Ohio Railroad." He testified that on May 20, 1921, he met plaintiff at the noon hour between twelve and one o'clock, at the lobby of the Continental & Commercial National bank, and went with him to defendants' office; that from 1912 to 1926 it was his custom and habit to have lunch with plaintiff once or twice a week continually; that he visited plaintiff at the places where he lived, played golf with plaintiff in Jackson park and acted as plaintiff's caddy. He says that plaintiff took

1. The above information was obtained from a confidential source who has provided reliable information in the past.

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It is recommended by the Board that the first amount made by the Board on balance be \$1,000,000. The Board has approved this recommendation and will be providing the Board with the same by the end of the year. The Board has also approved the Board's recommendation that the Board be authorized to make such other and further recommendations as may be deemed appropriate by the Board.

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two \$5,000 drafts from his inside pocket (he does not know whether it was the vest or coat pocket); that witness couldn't see whether he was taking it from the one or the other; that the plaintiff was standing about a foot and a half away from a window with the clerk facing him; that witness saw the two checks and took them in his hands and also took the currency in his hands; that the plaintiff put the money in his hands while he was standing before the window a foot and a half away from it; that the clerk was facing both of them; that the witness looked at the two drafts and counted over the money; that he examined it while the plaintiff was still standing there looking at the clerk; that plaintiff asked witness to count it but didn't tell him why and witness didn't wonder why; that he thought it was a natural transaction; that he had never done that before for him or anybody else and had never done it since; that he did this without any request from plaintiff but that plaintiff never told him why he asked him to do it. He says, "These bills were in \$1,000 denominations. They were not folded, they were laying right flat. They were apparently new; I wouldn't say brand new, but apparently new money. He did not have a string around them, they were open. After I counted them I gave them back to Mr. Herman. I also gave the cashier's checks back to Mr. Herman after I had looked them over. He passed the cashier's checks through the window; he passed the currency through the window. This clerk took it and said nothing but went away with the cashier's checks and the money; he walked down to the end of the office, towards me -- from our left, if I remember right, but I lost sight of him; I didn't follow him closely at all. I just saw him disappear." The witness says that the clerk had been gone about two or three minutes, when he came back "and gave me something. I examined the \$10,000 bonds, and I looked at the receipt for the bonds; and I also looked at the receipt for the \$10,000 in currency

which he deposited to his account; I looked at all three, the two receipts, and I counted over the bonds."

On other matters the memory of this witness was not quite so accurate. He could not remember whether it was a cold or a warm day or whether it was raining, but he testifies positively that he saw the invoice after that time; that he saw it in the office of an attorney, Mr. Keeley, some years afterwards, probably three years afterwards, and in the year 1924; that his occasion for going to Mr. Keeley's office was that plaintiff asked him to go along to see Mr. Keeley. He says that he glanced at the invoice again that day and handed it back; that he didn't examine it carefully; that it was lying on Mr. Keeley's desk. He had been at Mr. Keeley's office once before with plaintiff when plaintiff had a luncheon engagement with Mr. Keeley and had asked witness to go along. Although he went with plaintiff to Keeley's office he does not remember any conversation about that particular transaction. He was not able to give any description of the clerk to whom the checks and currency were given except that he was a middle aged man; he does not remember whether the clerk wore glasses, whether he was bald headed, whether his hair was light or dark, whether he was gray, whether he had a mustache or any beard nor the color of his clothes.

He testifies to the purchase of the \$1,000 bonds on May 3, 1922, at plaintiff's request, and says that the man he dealt with on that date was the same clerk to whom the money and drafts were given on May 20, 1921.

The testimony for defendants establishes the fact that there were six men in the bond cage at the time of this transaction in their offices, whose names were Nelson, Krantz, Gary, Cavanaugh, McGhie and Daley, all in the employ of the company at the time of the trial with the exception of McGhie and Daley.

which he mentioned in his account: I looked at Mr. Jones, the two

possibilities, and I thought very much about it.

On about November the twenty of this year was not

quite so certain. He could not remember whether it was a day or a week up or down it was raining, but he thought it was likely

that he saw the people after that time; that is in the

middle of the winter, Mr. Jones, was quite certain, possibly

three years afterwards, and in the year 1931; that is, possibly the

last of Mr. Jones's office was that possibly some of the

time of Mr. Jones. He says that he planned at the time

again that day and thought it best; that he didn't think it was

likely; that it was likely as Mr. Jones's last. He had been at it

possibly with some other Mr. Jones's office and

possibly afterwards with Mr. Jones and had some other to go

along. Although he went with him to Mr. Jones's office at

does not remember any conversation about that possible time-

then. He was not able to give any description of the office at

when the other and possibly were given wrong; that he was a little

and was; he had not remembered whether the other was a little

whether he was told that, whether the other was a little or not

whether he was given, whether it had a mistake or any other part

the rest of his office.

He testified to the purchase of the 71, and found in

May 2, 1931, at possibly a request, and was that the man in

could also on that date was the same office as when the money was

stated was given on May 2, 1931.

The following for information should be that the

there were six men in the last of the time of Mr. Jones

also in their office, whose names were Jones, Jones, Jones,

Greenberg, Kohn and Jones, all in the office at the same

at the time of the trial with the exception of Kohn and Jones.

The four were produced in court, and neither plaintiff nor his principal witness was able to identify any one of them as the person with whom they dealt in this transaction. Those who were present in court testified that no such transaction as described was had with any one of them.

If the testimony given in behalf of plaintiff by Thorberson is to be believed, the transaction could not have been had with Daley, for he left the employ of defendant prior to May 3, 1922, on which date Thorberson says he purchased bonds through the same clerk who took the currency on May 20, 1921. McGhie, the other employee, left defendants' employment in 1924 and was absent at the time of the trial at some unknown place in California. Clara Sawitowski, defendants' cashier, who signed the receipt upon which plaintiff relies, was no longer in the employ of defendants, but she testified positively that she did not receive the ten \$1,000 bills from the plaintiff on May 20, 1921, and that she had never received ten \$1,000 bills at any time while she worked for defendants.

Mr. Peterson, who was in charge of the bookkeeping department of defendants during April, May, June, July and August, 1921, and who was the chief bookkeeper, testified that during that time he had a telephone on his desk; that there was no telephone on the desks of any of the other bookkeepers in that department. He testified positively that he did not have any conversation by 'phone such as testified to by plaintiff on June 1, 1921, and he specifically denied the conversations testified to by plaintiff as having occurred on June 8th and 15th, 1921. He further said that no one in his department had ever reported to him any such conversation concerning plaintiff's balances; that he had never heard of any dispute concerning the same until August, 1924.

The other employees of the bookkeeping department like-

wise gave testimony denying that any such conversation had taken place at those times. Miss Sawitowski testified as to the manner in which the business was usually conducted at defendants' offices and defendants' books were introduced in evidence tending to sustain the contention of defendants that no transaction in which their offices received \$18,000 in currency from plaintiff occurred May 20, 1921, or any other time.

Indeed, the evidence would seem to exclude any hypothesis which would make such a transaction possible, unless it would be that the missing clerk abstracted the currency after he received it and before it reached the hands of the cashier. The testimony of the cashier is to the effect that the receipt which plaintiff obtained was one which, in the usual course of business at the time in question, would have been given to him as evidence of the receipt of the two \$5,000 cashier's drafts received in part payment for the bonds he had purchased. It would be remarkable if this employee, even assuming that he was dishonest, would have been so bold as to attempt anything of this kind under circumstances in which he must have seen two witnesses who had carefully counted the money and would be able at once to fasten the guilt upon him. The entire story of the plaintiff as related by him and his friend is highly improbable and seems almost impossible. Not to mention the other suspicious circumstances (which must be apparent), the fact that plaintiff failed for three years without any adequate excuse to confront the clerk to whom he says he gave this money, is sufficient, in our opinion, to stamp this whole transaction as a fiction unworthy of belief. No normal person desirous of protecting his interests would have so acted under the circumstances. He admits that he had no reason to doubt the honesty of defendants. According to his own story, the currency was given to their clerk in the presence of a good friend, who had been very careful to count and

examine the currency and drafts and to examine carefully all documents given to the plaintiff by the clerk. Plaintiff admits that he had full knowledge within a week that he had not been credited with the alleged deposit, and all his actions, including the discarding of the alleged invoice, the sending of a friend to make a deposit of \$500 and another to make a purchase of a bond, while he could have appeared himself with his friend and proofs which would have at once required this clerk to explain as to the alleged deposit of the currency, are inconsistent, in our opinion, with plaintiff's theory. The inherent improbabilities of the story related by plaintiff and his friend, the positive contradiction of one by the other upon material points, and impeachment of both by defendant's books and credible witnesses, the near spoliation of material evidence by plaintiff, his neglect for years to submit a claim to defendants, make it impossible to give credence to this improbable narration.

The testimony for plaintiff is improbable, unreasonable and contrary to normal human experience. In our opinion, the verdict of the jury is clearly and manifestly against the preponderance of the evidence. A plaintiff who given oral testimony which is contradicted in every essential particular by his own actions continuously for three years, cannot be said to have established his case by a preponderance of the evidence. Although the Statute of Limitations has not run, this does not preclude us from weighing this evidence. The verdict and judgment are clearly and manifestly against the evidence.

For the reasons indicated the judgment is reversed and the cause remanded for another trial.

REVERSED AND REMANDED.

O'Connor and McSurely, JJ., concur.

32339

242 I.A. 634²

JOSEPH FROHLICH, for Use of
HORTENSE P. STRAUS,
Appellee,

vs.

J. M. CAMELON and A. ROBERTSON,
Appellants.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

HON. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

Hortense Straus obtained judgment against Joseph Frohlich in the Circuit court of Cook county for the sum of \$5,000 and costs. An execution issued and was returned, and Camelon, Robertson and one Louis Neumann were thereupon summoned as garnishees.

Neumann answered that on October 29, 1926, Frohlich, the judgment debtor, had obtained a judgment against him, Neumann, for \$1,437.53; that on February 14, 1927, he received written notice from the other garnishees, Robertson and Camelon that this judgment had been assigned to them on October 29, 1926; that said assignment had been filed in the office of the clerk of the Circuit court; that he, Neumann, was ready to pay the judgment, but under the circumstances did not know whether he should pay it to Hortense Straus or to Camelon and Robertson.

Camelon by answer set up a claim that the judgment against Frohlich was the property of himself and Robertson by virtue of the assignment given, as he alleged, in consideration of legal services performed by him, Camelon, for Neumann, and money loaned to Neumann, the judgment debtor, by Robertson. Robertson answering, filed a plea in substance the same as that of Camelon. The cause was submitted to a jury which returned this verdict:

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Journal of the American Statistical Association 98(463):1043-1053

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to the 100th anniversary of the founding of the city of St. Petersburg

1. The first part of the paper is devoted to the study of the properties of the function $f(x)$ defined by the equation

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Approved: _____
Special Agent in Charge

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Alvin, it was the first time he had ever seen a man like that. He had never seen a man like that before.

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1996, p. 100. See also, for example, *Journal of the American Medical Association*, 276 (1996), 100.

of management in the U.S. to identify and use solid/rock ecology

The availability of reliable and accurate information is essential to the success of any project.

Very truly yours,
 [Signature]

continued, involved, and, rather than, all, names of places

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For more on this subject, see the sidebar on page 10.

"We, the jury, find the issues for the plaintiff and we find that at the time of service on the garnishees, Louis Keumann, of the writ issued in said cause, there was due and owing from the said garnishee to the defendant, Joseph Brohlich, the sum of fourteen hundred thirty-seven dollars and eighty-nine cents.

"And we the jury also find that the adverse claimant, J.M. Camelon, is entitled to receive the sum of five hundred (\$500) dollars, no cents and that the adverse claimant, A. Robertson, is entitled to receive the sum of nothing dollars and cents out of said sum as found due and that the plaintiff, Hortense P. Straus is entitled to the residue left from said sum."

Judgment was entered thereon by the court in favor of Camelon for \$500 and in favor of Hortense P. Straus for \$937.89, motions for a new trial and in arrest by Camelon and Robertson being over-ruled.

For technical reasons many of the obvious errors in this record may not be considered. It is urged that the instructions are erroneous, and they are; but the record fails to disclose at whose request the instructions were given or that any objection was made or exception taken to the giving of them. Moreover, while this point is made in the brief, it is not discussed in the argument. People v. Vickers, 326 Ill. 390; Malacki v. Seldman, 100 Ill. App. 484; Civilinski v. Mack, 211 Ill. App. 303.

It is urged that the verdict is contrary to the evidence, and this point must, we think, be sustained. The execution and delivery of the assignment is alleged is not contradicted, nor the consideration, as alleged, disproved. The burden of proof in this respect was on the garnisher, and while on this point the brief for the garnishees does not show a careful analysis of the evidence, the argument does undertake to summarize it. There is no evidence tending to sustain the verdict or judgments entered.

For the reasons indicated the judgments are reversed.

REVERSED.

O'Connor and McSurely, JJ., concur.

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STERLING-MIDLAND COAL COMPANY,
a Corporation,

Appellee.

vs.

GREAT LAKES COAL & COKE COMPANY,
a Corporation,

Appellant.

APPEAL FROM MUNICIPAL COURT

OF CHICAGO.

MR. PRESIDING JUSTICE MATCHETT

DELIVERED THE OPINION OF THE COURT.

This case was before this court on a former appeal, Sterling-Midland Coal Company v. Great Lakes Coal & Coke Co., 240 Ill. App. 216. The judgment of the trial court was reversed and the cause remanded because, in the opinion of this court, the trial court erred in striking defendant's claim of set-off. There was no controversy between the parties then nor is there now as to the justness of plaintiff's demand, which was for coal sold and delivered at defendant's request. The judgment there reversed was for the sum of \$28,455.03.

The cause has again been tried by the court and the evidence of the parties for and against the claim of set-off heard, resulting in a finding against defendant on its claim of set-off and in favor of the plaintiff on its claim and a judgment in favor of the plaintiff for the sum of \$31,047.55.

The matter in controversy concerns paragraph 1 of defendant's claim of offset which alleges that on April 4, 1924, and April 23, 1924, plaintiff and defendant entered into written contracts whereby defendant agreed to sell and plaintiff to buy certain coal screenings at the prices named; that plaintiff breached these contracts by refusing to accept the coal tendered by defendant. These written contracts are attached to the statement of offset. The defense interposed is that the coal tendered was not of the

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THOMAS and WILSON-BROWN
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Leaves: length 2.5-3.5 cm, width 0.5-1.0 cm, apex obtuse, base cuneate, margin serrate.

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Chapter 18 deals with the various ways in which the system is used.

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quality required by the agreement.

It may be well to state at the outset some of the uncontradicted facts. The Black Servant Coal Company operated what is known as a stripping mine in Elkville, Jackson county, Illinois. On March 26, 1924, it entered into a written contract with the E. S. Odbert Coal Company for the sale of coal to be shipped from this mine at a price of \$1.20 per ton for a period beginning April 1, 1924, and ending March 31, 1925. This contract contained the following provision:

"Quality: All coal shall be clean, well prepared and reasonably free from bone, slate, soapstone, shale, fire clay, sulphur and other non-combustible impurities. Coal is guaranteed to analyze not more than 15% ash, dry basis, and not less than 11,000 British Thermal Units, as received."

On the same date the Odbert Coal Company made a contract in writing whereby it agreed to sell and the Great Lakes Coal & Coke Company to buy the same coal. With the exception of the names of the parties and the price, the contracts were identical and contained identical stipulations as to the quality of the coal to be delivered. An analysis of this coal made on March 27, 1924, disclosed an ash content of 17.24 per cent.

Mr. Skakel of the Great Lakes Coal & Coke Company had very friendly relations with Mr. O'Brien of the Sterling Midland Coal Company, and about this time, on behalf of the Great Lakes Coal & Coke Company, opened negotiations for the resale of this coal to Mr. O'Brien's company. On April 4, 1924, as a result of these negotiations, defendant entered into a contract for the sale of 30 cars of coal per week to plaintiff at a price of \$1.50 per ton, and as a result of further negotiations another similar contract was entered into on April 23, 1924, for the sale of 18 to 30 cars per week at the seller's option at a price of \$1.50 per ton. The contracts were prepared by Mr. Skakel, who represented the Great Lakes Company. These two contracts contained almost similar pro-

provisions as to terms as the contracts between the Black Servant and Odbert Companies. The first paragraph of the contracts sued on leave out the word "quantity" and differ slightly on one or two other immaterial matters. The substantial difference between them, however, is that in these last two contracts there is no paragraph or provision describing the quality of the coal which was to be delivered. However, in each contract there is the provision: "Kind: Coal to be shipped from the stripping property of the Black Servant Co., located at or near Elkville, Jackson county, Illinois, on the Illinois Central Railroad." The Western Electric Company was one of the largest customers of the plaintiff company, and the contracts provided that the coal sold to plaintiff should be consigned to that company. As a matter of fact, for reasons which are immaterial, the parties orally agreed that the cars containing the coal might be consigned to the Standard Oil Company. After the execution of these contracts coal was delivered thereon from time to time. In July, 1924, the Western Electric Company complained to the plaintiff of the quality of the coal delivered, when Mr. O'Brien of the plaintiff company took the matter up with Mr. Skakel of the defendant company, and from that time until the latter part of August numerous complaints were communicated to the defendant company through Mr. Skakel by Mr. O'Brien. It was reported three times that the red mill of the Western Electric Company had been compelled to close down on account of the defective quality of the coal. The defendant company communicated these complaints to its vendor, the Odbert Coal Company, and Mr. Ward, then its western sales manager, went to the mine in Jackson county some time in July to look into the matter. He visited it again in August accompanied by Mr. Skakel. About August 25 or 27, after having a test made of the coal at the Western Electric Company, plaintiff notified defendant that it would not take any more of the coal. Thereafter, on October 13, defendant notified the Odbert

Company that it would no longer receive any of this coal under its contract.

The defendant Great Lakes Coal & Coke Company thereafter made a claim for damages against the Odert Company for breach of contract. A letter written by its attorneys is in evidence, stating the basis of its claim, which was that the coal furnished did not meet the requirements of the contract as to quality and averring a loss of twenty cents a ton on all undelivered coal. This claim was finally settled on March 24, 1925, when the Odert Coal Company paid the sum of \$5,500 to the defendant company for a release.

The cause was tried by the court and findings of fact and propositions of law were submitted. The trial court, over the objection of the defendant, permitted the introduction of parol evidence tending to show the purpose for which the coal was bought; that there was an express warranty of the quality and also parol evidence tending to show that the sale was induced by sample. As the coal offered was undoubtedly of the size and from the particular mine described in the contracts, it is apparent that the controlling question in the case is whether the court erred in admitting this parol evidence.

At the request of the defendant the court held that it was the law that when a written contract of sale upon its face was couched in terms such as import a legal obligation without any uncertainty as to the object or extent of the engagement, it was conclusively presumed that the whole engagement of the parties and the extent and manner of their undertaking had been reduced to writing. This proposition was marked by the court as "held" with the statement, however, that it was not applicable. The court held as a matter of law that the contracts between the parties dated April 4 and April 23, 1924, were respectively incomplete and that parol evidence not inconsistent with the contract was admissible to

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show the real intent of the parties thereto. The court also held as a matter of law that parcel evidence was admissible to show the quality of the coal purchased by the plaintiff on the contracts between the parties dated April 4 and April 23, 1924; also, that parcel evidence was admissible to show the purpose for which the coal was purchased by plaintiff under these contracts. Upon the facts the court held that plaintiff made known to the defendant the particular purpose for which the coal in question was required and that the plaintiff relied on defendant's skill or judgment and that various installments of coal furnished by defendant to plaintiff in the months of July and August, 1924, were not suitable for the particular purpose for which the goods were required; further, that plaintiff did not receive the quality of coal bargained for under the contracts between the parties.

It is the contention of the defendant that since these contracts were complete and include, as they assert, a definite description of the quality of the coal in question, the court erred in admitting parcel testimony tending to show that a sample of the coal had been taken prior to the execution of the contract; that defendant had been informed of the purposes for which the coal was desired and that there had been express warranties as to its qualities. The principal cases relied on and discussed at length in the briefs are Hells v. Brewer's Refrigerating Co., 141 U. S. 610, and Jelly-Ride Power Co. v. Crane Co., 204 Ill. 315. Defendant quotes the rule announced by our Supreme court in the latter case, as follows:

"The rule is, that when the writings show, upon inspection, a complete legal obligation, without any uncertainty or ambiguity as to the object and extent of the engagement, it is conclusively presumed that the whole agreement of the parties was included in the writings. The fact that a point has been omitted which might have been embodied therein will not open the door to the admission of parcel evidence in that regard.

The rule is too well recognized to require citation of authorities that all preliminary negotiations, whether oral or written, are merged in the written contract."

That the general rule is that oral contemporaneous evidence is not admissible to vary the terms of a written contract is, of course, elementary; nevertheless an examination of the cases discloses an apparent conflict in much of the language of the courts in which the rule is discussed. The rule presupposes a writing containing the complete contract between the parties. We think it has not been held in any well considered case that oral evidence is not admissible where part of the contract is in writing and part of it oral. Again, oral evidence is always admissible in order to show the surrounding circumstances under which the contract was made, not for the purpose of varying the terms of the contract but for the purpose of disclosing the intention of the parties to it as expressed in the writing, or a general custom may be shown to be a part of a contract although not expressly stated therein. Then, too, there is a clear distinction between evidence offered to vary the terms of a contract and evidence offered to identify the subject matter of the contract. Oral evidence is admissible for the latter purpose but not for the former. As was well said in the opinion in Klueter v. Schlitz Brewing Co., 143 Wis. 347, 128 N.W. 43, 32 L. R. A. New Series, 383:

"Oral testimony is admissible for the purpose of applying the contract to the subject with which it deals, and, in case of ambiguity then appearing, to establish the facts and circumstances under which the agreement was made, in order that the language thereof may be read in the light of the environment at the time the parties chose such language to express their intention."

See also Wigmore on Evidence, secs. 2330 and 2431.

An examination of these contracts discloses that the only provision therein which could even remotely be construed to describe the quality of the screenings to be shipped is that which says that is to be coal shipped by the Black Servant Coal Company, located at Elkhville, Jackson county, Illinois. It is at once ap-

parent that the contract is ambiguous and incomplete as to the quality of the coal which it was agreed should be delivered, and the defendant in support of its offer seems to recognize this fact by producing parol evidence, by which it endeavored to show that there was a custom in the trade that a provision of this kind was to be taken as a description of the quality of the coal. In submitting evidence of that sort, we think the door was opened to the oral evidence which was afterwards received tending to show express warranties that the coal should be good coal of the quality required to be delivered under the Odhart Coal Company contract.

Even if we err in this view of the situation, we think the evidence was admissible under section 15 of the Uniform Sales act (Smith-Hurd Ill. Rev. Stat. 1907, chap. 121, p. 2433,) for the purpose of showing an implied warranty that the coal should be reasonably fit for the purpose for which it was purchased. Under paragraph 4 of this section such an implied warranty would not be negatived by an express warranty or condition, unless it was inconsistent therewith, which it was not in this case. There are numerous authorities in this and other states construing the Uniform Sales act which sustain this construction. Craig v. Pellet, 209 Ill. App. 368; Giffard-Wood Co. v. Western Fuel Co., 209 Ill. App. 357; Lathrop-Paulsen Co. v. Parkman, 229 Ill. App. 470; Reichers Piano Co. v. Lindner, 221 Ill. App. 94; Harrison v. Fels Co., 192 N. Y. S. 538; Morris River Coal Co. v. Carthage S. F. & F. Co., 206 N. Y. S. 676.

Defendant contends, however, that the rule is not applicable here because these contracts disclose the sale of a known, definite and described article. In other words, defendant contends that the exception stated in paragraph 4 of section 15, namely:

"In the case of a contract to sell or a sale of a specified article under its patent or other trade name, there is no implied warranty as to its fitness for any particular purpose"

applies.

The reason for that rule is that in such case the seller has no discretion as to what he shall supply, the buyer bargains for a known, specific thing and that known, specific thing is furnished to him, but no such situation is disclosed by the facts here. The contract obligated the defendant to deliver to the plaintiff screenings one-fourth of an inch to two inches in size from the Elkville screenings of the stripping property of the Black servant Coal company, located at Elkville, but obviously the defendant had a wide discretion as to the kind of screenings from that property which it might tender in fulfillment of the contracts. Contrary to defendant's contention, defendant was the judge of the fitness of the coal to be tendered for plaintiff's purposes. There is a very clear distinction between the facts which appear here and those, for instance, in Puchs & Long Co. v. Pittsford & Co., 345 Ill. 48, cited and relied on by the defendant.

The defendant further contends that there is no evidence in the record which tends to establish the existence of facts sufficient to raise an implied warranty of fitness for a particular purpose, but an examination of the record discloses that this contention cannot be sustained. The contracts specifically provided that the coal should be consigned to the Western Electric Company, and there was also oral evidence to the effect that the coal was to be used by that company.

The defendant also contends that as there were written contracts, the oral evidence received to show that the sales were made by sample was inadmissible. It concedes that a diligent search has failed to disclose any authority in Illinois which would sustain this contention, but cites Wieser v. Whipple, 53 Wia. 338, 10 W. W. 433; Union Selling Co. v. Jones, 126 Fed. 579, and other cases. We think these cases are easily distinguishable, and what we have already said in discussing the general doctrine of the ad-

missibility of parcel evidence must stand as an answer to this contention.

Defendant also contends that the parcel evidence received did not tend to prove a sale by sample or express warranties of quality. We think there was evidence tending to prove that plaintiff was entitled to receive coal of the kind described in its letter of April 28, 1924, in which it is said:

"All that we are expecting under our contract with you for Elkville Screenings is good merchantable coal representative of the quality originally purchased -- and which you have been shipping us. If you continue in the manner as heretofore, I assure you we shall have no complaint."

Plaintiff contends that by presenting a claim against the Odbert Coal Company and obtaining a release thereof, defendant has made an election by which it is legally bound, and the court so held. Irrespective of the correctness of that conclusion as a legal proposition, we think there can be no doubt of the inferences of fact which may be drawn from that transaction.

We think an overwhelming preponderance of the evidence discloses that while coal of this kind may have been merchantable for some purposes, it was not at all fitted for the purposes which were disclosed to defendant at the time plaintiff bargained with it, nor at all of the quality which the oral evidence shows defendant had specifically bargained to give.

The judgment of the trial court was just and it is affirmed.

AFFIRMED.

O'Connor and McSurely, JJ., concur.

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Journal of Interpersonal Violence 28(10)

32433

SOL RUBIN,
Appellant.

vs.

SAMUEL MIDLINSKY et al.,
Appellees.

247-1684
APPEAL FROM CIRCUIT COURT

OF COOK COUNTY.

MR. PRESIDING JUSTICE HATCHETT

DELIVERED THE OPINION OF THE COURT.

This is an appeal by the petitioner from an order denying his right to file a bill to review a decree of the Circuit court of Cook county, which was affirmed by the Supreme court of Illinois in Rubin v. Midlinsky, 321 Ill. 430. As will appear from an examination of the opinion in that case, Sol Rubin filed a bill alleging that he was the real owner of certain premises, the title to which had been placed in Anna Midlinsky for her husband Samuel for the purpose of securing money due to Samuel from the complainant. The bill prayed an accounting and that the real estate might be impressed with a trust in favor of Rubin. Samuel and Anna Midlinsky answered denying the averments of the bill, and Anna filed a cross-bill praying that certain affidavits should be removed as clouds upon the title of Anna Midlinsky and that cross-defendant be permanently enjoined from further attempting to cloud her title. The decree was entered finding in favor of Anna Midlinsky, dismissing the original bill of Sol Rubin and granting the relief prayed for in the cross-bill. This proceeding is an attempt to relitigate the issues which were disposed of in that proceeding.

There is no doubt as to the rules of law which are applicable. These were stated in Waterman v. Hall, 258 Ill. 75, on which petitioner Rubin relies:

"A bill of review is in the nature of a writ of error, and its object, as indicated by its name, is to have reviewed a decree

tion or reversal of the decree by another trial of the issues upon which the case was first submitted. (Story's Eq. Pl., sec. 405; Albee v. Albee, 153 Ill. 132.) The newly discovered evidence must be such as relates to a matter in issue upon the hearing where the ground of the petition is for newly discovered evidence. The petition for the bill should be supported by affidavit of the petitioner, and it and the bill should also be supported by proper and competent evidence, and the facts to be testified to by witnesses should be sworn to by the witnesses who are expected to testify to them. The evidence must not be merely cumulative or of an impeaching character. (Albee v. Albee, supra; Lewis v. Tonsico, 201 Ill. 320.) The original findings of the court are not to be disputed or contested, but the question is, will the newly discovered facts produce a different result or finding? (Turner v. Barry, 3 Gilm. 541.) The new facts to be proved are supposed to be entirely new facts or new evidence of a positive and convincing character, - not merely cumulative or of an impeaching nature. This court, before reversing the order denying the right to file the bill should be able to say from the allegations of the bill and the offered testimony, that if true a different decree would in all probability result in the cause."

It must also be made to appear that the newly discovered evidence is such as could not by the exercise of reasonable diligence have been discovered and used before the entry of the original decree. Lewis v. Tonsico, 201 Ill. 320.

An examination of the amended petition discloses that the alleged newly discovered evidence here consists, in the first place, of the testimony of one William H. Jackson as to certain admissions made to him by the Midlinskys affecting the title to the real estate in controversy. There was an abundance of similar evidence submitted upon the original hearing, so that this evidence would be only cumulative. Not only is there no showing of diligence in attempting to secure the evidence, but it affirmatively appears from the record that the witness was available at the time the hearings were held in the original suit.

The second item of evidence which is alleged to have been newly discovered consists of a letter from one Charles Leviton, who at one time acted as an arbitrator of the differences between Rubin and Midlinsky, in which Leviton agreed that he could give one Bernstein a lien on the premises to insure the payment by Rubin of \$2,000 with interest. Bernstein was a witness upon the hearing in

the original case, and this letter, if produced, would be merely cumulative. Also, it might have been discovered upon the original hearing by exercising due diligence.

This petition would appear to be a further attempt to cloud the title to this property, which the record discloses has now been transferred to a third person.

The trial court properly refused permission to file the bill for review, and the decree will be affirmed.

AFFIRMED.

O'Connor and McSurely, JJ., concur.

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific information required.

[illegible]

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32439

LESTER W. STEWART,
Appellee,

vs.

MIKE TELECHANSKY,
Appellant.

67-2497-634⁵
a
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

The plaintiff filed^a statement of claim in which he alleged that on May 1, 1924, he was a licensed real estate broker in the city of Chicago; that on that date the defendant hired plaintiff to secure for him vacant or unimproved property; that on August 8, 1924, he procured such property and that through his efforts the defendant purchased the same; that defendant promised to pay plaintiff the sum of \$500 as compensation for his services, and that plaintiff had demanded payment, which had been refused. The affidavit of merits denied that plaintiff was licensed on May 1, 1924, and denied the hiring or employment, but admitted the purchase of the premises, plaintiff and one Cary acting as agents in the sale of the same. The affidavit denied the promise to pay plaintiff \$500 or any other sum, and denied that any services had been rendered by plaintiff in connection with the sale of this real estate at the request of defendant.

The cause was tried by the court without a jury and at the close of the evidence there was a finding against the defendant and judgment entered thereon. Plaintiff has not appeared in this court to support the judgment.

The evidence tends to show that on August 12, 1924, defendant entered into a written contract for the purchase of the real estate in question; that defendant purchased the same for the purpose of erecting a building thereon and to re-sell it, and that

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doi:10.1017/S0022292412001913

Received: 10 October 2017; Accepted: 12 November 2017; Published: 14 November 2017

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Reflected in the above is the fact that the

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10-10-68

of the execution at the time of the contract defendant gave plaintiff an exclusive agency to sell the property after the building had been completed. It also appears that when the contract of sale was about to be signed plaintiff, having been told by Mr. Gary that he, plaintiff, would not be paid any commission, for the first time asked defendant to pay him a commission on the deal. At about this time plaintiff offered the property to other prospective purchasers, and there is no evidence in the record tending to show that the defendant at any time requested plaintiff's services in procuring the property. Plaintiff says that at this time he told defendant that Gary would not pay him a commission, and that defendant said, "Well, I will take care of you," but that he would not pay it right away.

Victor F. Frank, an attorney, who was present at the closing of the deal, testified that just before the contract was signed plaintiff brought up the question as to what portion of the commission he was to receive for his services, and that Gary told plaintiff that he would not get any commission; that plaintiff turned to defendant and said, "How about it, Mr. Telechansky? You ought to pay me something; I got you a good deal without any cash;" that Mr. Telechansky said, "I will fix you up;" that Mr. Stenhouse said, "What do you mean - fix me up?"; that Mr. Telechansky said, "I will give you a couple of hundred dollars;" that Mr. Stenhouse said that wasn't enough for the services he had put in there; that Mr. Telechansky said, "How about \$500?" This witness testified that defendant said, "I can't pay you when the deal is closed; I am short of cash; you will have to wait," and that plaintiff said, "All right, I will wait."

Mr. Gary, testifying for the plaintiff, said that he was present at the time the deal was closed and that about all he could recall of the conversation between plaintiff and defendant was that plaintiff brought up the question of commission and that the

of the commission
 at the time of the meeting between the two parties in connection
 agency to sell the property with the building and some land attached.
 It also appears that when the contract of sale was made in 1914
 it was stipulated that the land was to be sold by the plaintiff,
 and that the defendant was to be paid the purchase price.
 and to pay him a commission on the deal. It should be noted that
 the plaintiff's testimony is that the defendant was not to be
 is an evidence in the record showing in 1914 that the defendant
 was then proposed plaintiff's commission to be paid the property.
 plaintiff says that in this case it was stipulated that the
 and that the defendant was to be paid the purchase price.
 of the deal, but that he would not pay it in 1914.
 William E. Frank, an attorney, who was present at the
 signing of the deal, testified that there was no contract was
 signed plaintiff's interest in the property as was stated in the
 deposition he was in possession of the property, and that he was
 plaintiff's interest in the property; that plaintiff
 signed to defendant and said, "I am about 15, 16, 17 years old."
 signed to him as a witness; I am not a good deal without any money;
 that Mr. Telephor said, "I will take you up; I will take you up."
 said, "What is your name - the name?" said Mr. Telephor said,
 "I will give you a receipt for the property; I will give you a receipt
 will that receipt signed by the defendant in 1914 and in 1915; that
 Mr. Telephor said, "I am about 15, 16, 17 years old."
 that defendant said, "I am not a good deal without any money; I am
 about 15, 16, 17 years old; you will give me a receipt for the property."
 signed, I will sell."

Mr. Frank, testifying for the plaintiff, said that he
 was present at the time the deal was signed and that about 1914
 could recall of the conversation between plaintiff and defendant was
 that plaintiff brought up the question of commission and that the

witness told him, "We couldn't pay the commissions;" that there was some arrangement for plaintiff "receiving an exclusive on this property for a period of one year for the new building." The defendant denies the promise as testified to by the plaintiff, and he is corroborated by a relative who said he was present and heard the conversation. The contract made at this time is in evidence and does not contain any promise to pay a commission to plaintiff.

The manifest weight of the evidence shows that plaintiff was not acting in behalf of defendant in the sale of this property. A promise to pay him a commission would have been without consideration and therefore unenforceable. Plaintiff is not entitled to recover, and the judgment in his favor will be reversed with a finding of facts.

REVERSED WITH FINDING OF FACTS.

O'Connor and McGuire, JJ., concur.

FINDING OF FACTS.

We find as facts that defendant did not make the promise to plaintiff upon which plaintiff sues, and that there is nothing due from defendant to plaintiff.

THE

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32405

PAUL ELLIS,
Appellee,

vs.

LOUIS A. MANDEL and
ANNA MANDEL,
Appellants.

249 I.A. 635

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE MATCHETT

DELIVERED THE OPINION OF THE COURT.

Plaintiff Ellis sued defendants, Louis and Anna Mandel, husband and wife, filing a statement of claim for labor and material alleged to have been furnished to defendants at their instance and request.

The affidavit of merits denied that any sum was due or that any work or material was furnished by plaintiff at defendants' request. The affidavit averred that defendants had agreed to rent a certain store to a tenant upon certain conditions, and that they were receiving bids for plumbing, carpentry, tinning and painting to prepare the store for this tenant; that defendant Anna Mandel was in the store and that plaintiff made an offer to paint the steel ceiling and woodwork with two coats of paint, varnish the floors, paper the walls and make a border and repair four plastering patches for \$75; that defendant accepted the offer conditionally; that plaintiff obtained the key to the store on the pretext that he desired to show the job to his partner; that when defendant Anna Mandel entered the premises next day she noticed plaintiff and another man painting and ordered them to desist and leave the premises at once.

The record states that the cause was submitted to the court for trial without a jury, and that there was a finding of the issues against the defendants with damages assessed at \$122 and judgment entered thereon.

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There is a statement of facts which recites that the cause came on for trial on October 14, 1927; that plaintiff and Anna Mandel appeared for trial; that the court stated that the trial must be concluded within one hour; that no stenographic report was had; that the "court does not remember facts excepting the following:

"When the evidence was concluded defendants by their counsel tendered to the court the following propositions of law:-----

Mr. Levin: Your Honor, I desire at this moment to present two propositions of law.

The Court: I don't want any propositions of law.

Mr. Levin: All I ask, your Honor, is that you read these propositions of law and mark them 'accepted' or 'refused.'

The Court: All right, give them to me.

Whereupon the court marked after each proposition the word 'refused.'

The Court: You have spoiled your case; I wanted to help you out, but now I will give judgment for the plaintiff."

The statement of facts was signed by the trial Judge on November 16, 1927. The court specifically certified that he did not remember "just what testimony was offered," but it is apparent from the meager record that the defendants did not have a fair and impartial trial. The defendants had a right to submit propositions of law and to have the court consider and rule upon them. The court had no right to become offended because of the exercise by defendant s of this undoubted right and for that reason make a finding and render a judgment against the defendants. Not unmindful of the general rule that evidence not preserved in a bill of exceptions will be presumed to sustain the finding of the court, we hold that rule not applicable where, as here, it affirmatively appears the finding and judgment are not based on the evidence at all.

In order that defendants may have a trial, the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

O'Connor, J., concurs.

McSurely, J., Dissenting:

I cannot agree that it is reversible error for the trial judge to change his mind during the trial, when, for aught the record shows, the evidence warranted the ultimate decision rendered.

ALVIN E. NELSON and MAHL S.
NELSON, Copartners doing
business as NELSON BROTHERS,
Defendants in Error,

vs.

ERNEST T. WIX,
Plaintiff in Error.

249 I.A. 635²
ERROR TO MUNICIPAL COURT
OF COOK COUNTY.

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

Plaintiff in error was defendant in the trial court and seeks to reverse an order entered denying his motion to set aside a judgment entered by confession on June 14, 1927. The motion was supported by an affidavit to the effect that the note upon which judgment was entered had been executed and that to secure payment of the same defendant had deposited with plaintiffs a contract for the purchase of certain real estate in which defendant had an equity of \$500, and also a chattel mortgage on an automobile which was valued at \$1200; that until June 1st thereafter payments continued to be made to plaintiffs on the notes and that at that time defendant notified the plaintiffs that he could not make further payments; that it was then agreed between plaintiffs and defendant that if defendant would return the automobile and surrender his equity in the real estate contract plaintiffs would accept the same in full payment and discharge of the note.

Defendant further averred that he complied with the promise made in this agreement and that plaintiffs accepted the automobile and contract and defendant heard nothing more of the matter until the entry of judgment by confession.

Plaintiff has not appeared in this court to defend the judgment. We think the affidavit set up a complete and meritorious defense, and that in the exercise of its discretion the court should

280. A. 1025

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— *Journal of the American Medical Association*, 1994; 271: 1009-1010

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For the error in refusing to allow the motion, the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

O'Connor and McGurely, JJ., concur.

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32542

249 I.A. 635

CHARLES HORN, Doing Business
as Charles Horn Lumber Company,
Appellee.

vs.

DAN LA BAR and E. F. FIGHTER,
Appellants.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

Upon trial by the court there was a finding for the plaintiff and judgment thereon for \$215.86 which defendants by this appeal seek to reverse. The suit was upon an alleged promise to reimburse plaintiff for expenses incurred in the collecting of two promissory notes aggregating \$2,500, payable to Hewitt Lumber Company and executed by one Ashbury H. Vale.

The statement of claim averred the promise to reimburse plaintiff for expenses incurred to the amount of the judgment. The affidavit of merits denied the promise, admitted a refusal to pay and interposed a plea in substance amounting to the Statute of Frauds.

There was proof tending to show (and there were findings by the court which defendants do not contend are against the weight of the evidence) that the Hewitt Lumber company was indebted to plaintiff and that defendants urged plaintiff to take notes upon such indebtedness, promising that if it was necessary to incur expenses in collecting the same defendants would reimburse plaintiff therefor; that plaintiff took the notes and incurred expenses to an amount for which he seeks by this suit to collect. It is uncontradicted that the promise was not in writing, and defendants contend, citing authorities, that the Statute of Frauds, which is pleaded, prevents a recovery.

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This document is a copy of a letterhead memorandum
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Very truly yours,
Attorney General

There was great feeling in the (and there was) and
by the court which decided to not proceed and again the
of the witness, that the witness was not
to identify and that defendant was identified in the case was
and interview, revealing that it was necessary to have an
person in relation to the case. Defendant would not identify
therefore, that defendant took the case and interview, resulting in an
document for which he needs to be able to identify. It is known
provided that the witness was not in position, and defendant was
and, after interview, that the witness of the case, which is
attached, contains a summary.

However, the promise as disclosed was not collateral but original. The credit was given by plaintiff to defendants. Therefore, the plea of the Statute of Frauds is not applicable, and cases cited by defendants to the point that a promise of a stockholder to pay a debt of a corporation is a collateral promise are not controlling. The promise made was that of defendants, not of the corporation, and the consideration moved from plaintiff to defendants. Duganberry v. Sims, 286 Ill. App. 448, upon which defendants rely, is against them.

The judgment is affirmed.

AFFIRMED.

O'Connor and McSurely, JJ., concur.

32760

LOUIS MISERALLI,
Appellee,
va.
ISRAEL GOLDBERG,
Appellant.

67-249-4635⁴
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

Plaintiff sued, alleging that defendant is a garage keeper who undertook to care for plaintiff's automobile for a reward and negligently permitted the same to be stolen. The statement averred that the machine was recovered by the police department and delivered to the defendant in a broken and damaged condition, and claimed damages for the deterioration of the machine and for expenses incurred in recovering it.

The affidavit of merits denied liability generally, denied the negligence alleged, averred due care in the keeping of the automobile and the release of the defendant from all claims.

There was a trial by the court and finding for the plaintiff in the sum of \$375, on which the court entered judgment.

The defendant says, in the first place, that there is no proof of negligence and, second, that assuming such negligence, there is no competent proof of damages.

The plaintiff testified that he took his automobile to the garage on June 23, 1936; that he was accompanied by his son; that the night man, Steve Cigan, was in the garage at that time; that plaintiff put the machine in the stall; that he returned three days later and found that the car was not there. He says that at the time he left the car in the garage he locked the gears and the doors of the machine.

Plaintiff further testified that as he wished to get a

new car he traded the machine after it was recovered for a new one, paying \$1745 for the new car and receiving a credit of \$1300 in the transaction for the old one. It is apparent that this was a mere trading of machines, evidence of which would not tend to show the real value of either machine.

There was evidence for the defendant tending to show that as a matter of fact plaintiff's automobile was not stored in the garage at the time in question, but assuming that it was stored there, the burden of proof was upon plaintiff to show the amount of his damages. Blasien v. Tarasewsky, 242 Ill. App. 101. If we assume that negligence might be inferred from the record, the judgment nevertheless cannot stand because there is no competent evidence tending to show that plaintiff sustained damages in the amount for which judgment was entered.

For the reasons indicated the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

O'Connor and McGuirely, JJ., concur.

32751

249 LA. 636

FRANK P. NEPPER,
Appellant,

vs.

HELEN FIGHTER NEPPER,
Appellee.

6722a
APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

Frank P. Nepper, complainant, filed a bill against his wife praying for an annulment of their marriage. She answered and filed a cross-bill praying for separate maintenance. Thereafter she filed a petition for alimony and solicitor's fees pendente lite. She averred that her husband was a man of large means and engaged in a profitable business; that she was wholly without funds and had no income of her own to pay board and room and solicitor's fees until the final determination of the cause.

Complainant answered the petition, alleging that the separation was by agreement, denying that he was a man of large means or employed in a profitable business, but averring on the contrary that his sole income was from a partnership in a greenhouse business which had been recently organized and which was not then on a paying basis; that the gross profits from August, 1926, to December, 1927, did not exceed \$500 and that the business showed a net loss to the partners. He averred that before the marriage his wife was earning \$14 a week as a clerk and alleged that she was well able to earn that amount and pay for her own support, costs and expenses.

The court heard the evidence and entered an order that defendant pay \$20 a week and \$100 solicitor's fees. The husband seeks to reverse this order, and in support of his appeal urges that the order is manifestly contrary to the greater

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The court's decision was based on the fact that the defendant had been convicted of a crime involving the same conduct as the crime charged in the indictment. The court found that the defendant's conviction was a bar to the prosecution of the crime charged in the indictment.

weight of the evidence.

The evidence is somewhat meager, but from it the court could properly find that the wife was unable to work and earn her living. It also tends to show that the complainant husband is in the greenhouse business and that he and his partner are running eleven greenhouses. In response to questions by the court the complainant said that his father had been in the same business and that the copartnership had taken over the greenhouses from the father; that the father did not make \$300,000 out of the business but that he owned real estate and that with the increase in values "it maybe brings that in today."

The amount of alimony, pendente lite, and solicitor's fees to be allowed in cases of this kind are very much in the discretion of the court, and we do not think that this discretion has been abused by entry of the order appealed from. It will therefore be affirmed.

AFFIRMED.

O'Connor and McSurely, JJ., concur.

which of the witnesses.

The witness is somewhat nervous, but in the

examined would probably find that the witness is not

very far from it. It also tends to show that the

testimony is in the general nature of what he and his

other brother have experienced. In response to questions by the

court the witness has said that he has been in the same

business and that the opportunity has been given the witnesses

from the fact that the witness is not alone, but at the

testimony and that he would not be able to do the business

in regard to the witness that is being.

The witness is nervous, somewhat ill, and nervous.

There is no attempt to show of this kind or very much of the

testimony of the court, and we do not wish to do this

has been stated by many of the other witnesses. It will

therefore be sufficient.

WITNESS.

Witnesses and testimony, II, 1900.

32503

249 I.A. 036²

F. W. O'TOOLE,
Plaintiff in Error.

vs.

SHANK COMPANY, a
Corporation,
Defendant in Error.

SEARCHED TO SUPERIOR COURT
OF COOK COUNTY.

MR. JUSTICE McSURNELY DELIVERED THE OPINION OF THE COURT.

By this writ of error the plaintiff seeks the reversal of a judgment in his favor for \$250 entered upon an instructed verdict. Plaintiff's action was in assumpsit, claiming \$12,250 damages, and he argues that the trial court erroneously instructed that he was entitled to only \$250.

The controversy arises out of and involves a contract between the parties relating to the construction of a hospital and auxiliary buildings for the United States Government in Broadview, Illinois, otherwise called the Speedway hospital. The contract in question was dated April 14, 1920, wherein Shank Company, the defendant, was designated as contractor and O'Toole, the plaintiff, was designated as subcontractor. The subcontractor agreed to furnish the labor and material for the lathing and plastering work, but the contractor was to pay direct to the materialmen and the workmen for all the material and labor of the workmen. The decisive question relates to Paragraph 5 of the contract, which is as follows:

"In addition to paying labor and paying for materials furnished under this Sub-Contract, the Contractor agrees to pay to the Sub-Contractor, in full for all services rendered under this contract for the furnishing of said labor and materials, the sum of One Thousand Dollars (\$1,000) per month, during the time this part of the work is progressing rapidly, to be paid in semi-monthly installments. It being mutually agreed between the parties hereto that the amount to be paid by the Contractor to the Sub-Contractor for his services under this contract shall in no event exceed the sum of Five Thousand (\$5,000) Dollars."

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Paragraph 3 provides that work should commence when the construction of the building requires the same; that the subcontractor must keep himself thoroughly informed concerning the progress of the building and must have his materials ready for work within a day's notice. There was a provision that the "entire work shall be completed within two months from the date of this agreement," and that no changes or alterations of the contract shall be binding unless in writing and attached to the contract.

Plaintiff's declaration alleges that the defendant delayed the progress of the work so that, instead of taking two months for completion as required by the contract, it took seventeen months and thereby defendant became liable to pay plaintiff \$1,000 a month for seventeen months; that the defendant had paid plaintiff \$4750, leaving a balance due of \$12,250.

The trial court was apparently of the opinion that, while there was some unexpected delays, the contract was never abrogated in any way and the parties went on to fulfill the same; that the provision in paragraph 5 to the effect that the amount to be paid to the subcontractor under this contract "shall in no event exceed the sum of Five Thousand (\$5,000) Dollars" was binding on both parties, and, as plaintiff admitted having received payment of \$4750, there was due him only \$250, and the jury was instructed accordingly. We are of the opinion that this ruling was proper and that there was no error in giving the peremptory instruction.

Plaintiff contends that, where there is an express written agreement providing for a time limitation for the completion of the work and one of the parties prevents the completion, the other party is entitled to additional compensation for the additional time necessarily taken to perform the contract. The cases cited tend to support this general proposition, but neither

it nor the cases are applicable to the instant situation.

In Tobey v. Price, 75 Ill. 648, there was a stipulation that Price would be liable to Tobey for negligence, carelessness, or omission of duty on his part; there is no such provision in the instant contract. Furthermore, there was no provision specifying the amount and limit of compensation to be paid if the work took longer than contemplated. In another cited case, Quinn v. Cook v. Harns, 100 Ill. 191, the contract provided that, in the event changes, additions or alterations should be made, they would be paid for as extra work. Subsequently new plans were adopted which so differed from the old plans as to constitute a new and different job. It was held that the change in the plans was so radical as not to be regarded as within the meaning of the contract. In City of Elgin v. Jeslyn, 136 Ill. 828, it was held that, where extra work and materials are of different character from those specified in the contract, the rates carried in the contract will not apply and the person supplying the same may recover their value as shown by the evidence.

A vital point of difference between these cases and the present case is that the instant contract evidently contemplated that there would be delay in construction. The provision for payment in paragraph 5 of the contract particularly provides for the payment of compensation of \$1,000 a month to the subcontractor "during the time this part of the work is progressing rapidly." This can mean only that in contemplation of both parties there would be delays and that the subcontractor should not be paid for the time his work did not progress rapidly. If this were not so, the contract would have provided for total compensation to the subcontractor of \$2,000, based on the time limit of two months and the monthly compensation. Plaintiff might then have some basis for his claim for extra compensation for the extra time. Apparently it was thought if the work progressed rapidly, it could be completed in two months, but as

progress might be interrupted, the parties took special pains to provide that "in no event" should the amount paid for services exceed \$5,000. Cases tending to support the correctness of this construction are City of Chicago v. Barton, 119 Ill. 230; Riss v. Partello, 88 Ill. App. 52; Chicago Training School, etc. v. Davies, 64 Ill. App. 503; Follitt v. Hunt, 21 Ill. 654.

It should be further noted that the evidence fails to establish that the delay was solely, if at all, caused by the fault of the defendant. A witness, testifying on behalf of plaintiff, stated that the work was suspended several times on account of strikes. At one time the work was suspended for about five weeks because of a jurisdictional controversy between different trades.

Under the terms of the contract limiting the amount of compensation to be paid to plaintiff, he is entitled to recover no greater sum than was allowed him in the verdict rendered. The judgment thereon is therefore affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.

32586

ELSA SIPPEL,
Defendant in Error.

v.

ERNEST H. SIPPEL,
Plaintiff in Error.

249 J.A. 436³
6724a
} ERROR TO SUPERIOR
COURT, COOK COUNTY.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

By this writ of error defendant questions the proceedings in an action for separate maintenance. His brief completely disregards rule 19 of this court.

It is asserted that the court did not have jurisdiction, but no basis for this assertion is given. The bill stated that the parties were married on December 8, 1917, in Chicago, and have continuously resided here since that date. Defendant was served with summons and filed his appearance by his attorney. The court had jurisdiction of the subject matter and of the parties.

Some criticism is made of the bill, which alleged that the parties lived together "until on, to-wit: the 23rd day of August, A. D. 1926." It was sworn to on August 23, 1926, and filed August 24. The argument seems to be that the allegation that the parties lived together until August 23, 1926, is inconsistent with the date on which complainant subscribed and swore to the same. The date in the bill is alleged under a videlicet. The evidence shows and the decree found that the last abusive conduct of the defendant towards the complainant was on August 22,

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when defendant threatened to kill her with a loaded revolver, and on the same date she left defendant and has ever since this date lived separate and apart from him. We see no error in this regard.

It is asserted that the case was tried by default, although defendant's answer was on file, and no order of default was entered. The case was not tried by default. The attorney for the defendant was present when the case was called for trial and stated to the court that he had been unable to find the defendant who "had left the jurisdiction of the court." This was not a trial by default.

The chancellor allowed \$35 a week for the support of the complainant and the two minor children. The evidence indicated that defendant made \$250 a month. The amount allowed was reasonable.

The proceedings were without prejudicial errors and they are affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.

32640

BELLA SCHIFF,
Appellant,

v.

SARAH STANLER and
PHILIP STANLER,
Appellees.

672950-364
APPEAL FROM COUNTY COURT,
COOK COUNTY.

MR. JUSTICE McSWEENEY DELIVERED THE OPINION OF THE COURT.

Plaintiff seeks the reversal of an order vacating a judgment had by her against defendants in the sum of \$599.55.

The judgment was entered May 10, 1927, and defendants' petition to vacate was filed January 4, 1928, which was seven terms after judgment. Plaintiff filed a demurrer to defendants' petition which demurrer was overruled and an order was entered setting aside the judgment, from which plaintiff appeals.

A judgment cannot be set aside after the term except under section 89 of the Practice Act, and the errors of fact which may be corrected under that section are the same errors which might have been corrected under the Common Law by the same writ. Horris v. Chicago House Brecking Co., 314 Ill. 500; Chapman v. North American Life Ins. Co., 292 Ill. 179; People v. Noonan, 276 Ill. 430.

The petition^{alleges} that the defendants filed a demurrer to plaintiff's declaration and "that without notice to affiant, the demurrer was overruled on motion of plaintiff's attorney on April 29, 1927; that without notice to affiant, the defendants were ordered to plead in five days; that without notice the cause was set down for May 10, 1927," and that on this latter date judgment was entered against defendants by default. Although

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THE UNITED STATES OF AMERICA

DEPARTMENT OF JUSTICE

WASHINGTON, D. C.

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U. S. DEPT. OF JUSTICE

TO THE HONORABLE ATTORNEY GENERAL, U. S. DEPT. OF JUSTICE, WASHINGTON, D. C.

SIR:

I have the honor to acknowledge the receipt of your letter of the 10th inst. and in reply to inform you that the same has been forwarded to the proper authorities for their consideration.

I am, Sir, very respectfully,
 Yours very truly,
 J. Edgar Hoover

Special Agent in Charge

the petition alleges that the defendants' demurrer was overruled "without notice to affiant," the record shows that both parties were present in court April 29, 1927, when this was done. The order recites: "This day again come the parties to this suit by their respective attorneys, and thereupon, after a hearing, on motion of the plaintiff, said defendants' demurrer is hereby overruled, and it is further ordered that said defendants have leave to file plea within five days from the date hereof, and the further hearing of said cause is hereby set for May 10, 1927." The record imports verity and affidavits cannot be heard to contradict it. The People v. Noonan, 276 Ill. 430.

The basis of defendants' petition is that the disposition of demurrers under a rule of the County Court is usually on Saturday or at such other time as may be specifically appointed by the court, due notice thereof being given; that April 29, 1927, the day on which the demurrer in question was overruled, was not Saturday and was a special date and that notice thereof was required but not given. If, however, as the record shows, the defendants were present in court by their attorney when the demurrer was passed upon, after a hearing, a previous notice would have been useless. Admitting the facts to be as alleged in the petition, no errors of fact are set forth which would have prevented the entry of the order, if the court had known them. It is only such errors of fact which may be corrected under section 89. Gramer v. Commercial Men's Assn., 260 Ill. 316.

The facts set forth in the petition did not justify the entry of the order vacating the judgment had by plaintiff, and the order appealed from is hereby reversed.

REVERSED.

Matchett, P. J., and O'Connor, J., concur.

The position alleges that the defendant's statement was overruled
"without notice or hearing," and further alleges that the court
was divided in such April 22, 1937, when this was done. The
court replied: "This day again upon the motion to set aside the
final judgment entered, and remanded after a hearing, an
order of the court, and the defendant's motion is denied
without, and it is further ordered that the defendant pay
leave to file this within five days from the date herein, and
the further hearing of said motion is hereby set for May 12, 1937.
The court hereby certifies that the defendant's motion is denied."

Exhibit 11 - The People v. Hanson, 178 Cal. 400.

The facts of defendant's petition in this the disposition
of defendant under a rule of the County Court is usually an
allegation of at least other time as may be specifically appointed
by the court, and notice thereof being given; and April 22, 1937,
the day on which the defendant in question was overruled, was not
definitely and was a specific date and that notice thereof was
served on him and upon the court, as the court stated, the
defendants were present in court by their attorney upon the
matter and that upon their motion a judgment was entered
upon them without a hearing, and that the court is alleged in the
petition, no effort of fact was made which could have prevented
the entry of the order, if the court had known them. It is only
such attempt of fact which may be considered under section 37.

Exhibit 12 - The People v. Hanson, 178 Cal. 400.

The facts set forth in the petition are not exactly
the entry of the order vacating the judgment and by plaintiff,
and the entry of said order is hereby reversed.

32675

PAUL GERRHARDT,
Appellee,

vs.

HORACE L. EHARD,
Appellant.

24974636
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE McSHERLY DELIVERED THE OPINION OF THE COURT.

Defendant appeals from an adverse judgment of 18-0 entered in a fourth class case upon a trial by the court of a claim for compensation for services rendered as an architect by plaintiff to defendant.

It is first argued in defense that the pleadings show that the action is barred by the five year statute of limitations. The first statement of claim was filed February 13, 1926, and alleged that the services were rendered on "to-wit, the month of June, A. D. 1921." The date was alleged under a videlicet. Another claim was filed March 12, 1926, stating the services rendered with more particularity. A second and ^athird amended statement of claim were filed on November 16, 1927, and November 26, 1927, respectively, which were identical with the statement of claim filed March 12, 1926, except as to the date of the alleged services. The second amended statement alleged the date to have been June, 1922, and the last amended statement alleged that the work was done during the months of "April, May and June, A. D. 1922." The defendant pleaded the statute of limitations to the last amended statement. The argument is that the third amended statement of claim sets up a new cause of action, namely, services which were performed in April, May and June, 1922, whereas the original statement of claim alleged that the services were performed in June, 1921; also that the original statement alleged that defendant promised to pay \$600 for the ⁱⁿ services, whereas the third amended statement plaintiff sued on

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1. The first of these is the fact that the evidence is not consistent with the theory that the explosion was caused by a single person. The evidence suggests that there were at least two people involved in the explosion. One person was seen running away from the explosion, and another person was seen running towards it. This suggests that there was a struggle or a fight between the two people. The fact that the explosion occurred in a public place, such as a crowded street, also suggests that there was a struggle or a fight between the two people. The evidence is not consistent with the theory that the explosion was caused by a single person. The evidence suggests that there were at least two people involved in the explosion. One person was seen running away from the explosion, and another person was seen running towards it. This suggests that there was a struggle or a fight between the two people. The fact that the explosion occurred in a public place, such as a crowded street, also suggests that there was a struggle or a fight between the two people.

a quantum meruit and also alleges an account stated between the parties.

We do not consider the subsequent amended statements of claim as stating a new cause of action, but as stating more particularly the matter set forth in the original statement with the correction of the date from 1921 to 1922. The original statement sets forth the preparation of plans and drawings for a building to be erected at 1446 South Wabash avenue, Chicago, and every subsequent statement, including the last, sets up the same matter, to-wit, the employment by defendant of the plaintiff in inspecting, measuring and preparing plans and drawings for a building at 1446 South Wabash avenue, said premises being owned and controlled by the defendant. It has been held in such a case that the statute is not a bar. Lansguth v. Village of Glenview, 253 Ill. 505; Jorge v. A. T. & S. F. Ry. Co., 182 Ill. App. 239; Monahan v. Fidelity Life Ins. Co., 242 Ill. 488; Collins v. Sanitary District, 270 Ill. 106.

While there are cases holding that under Common Law pleadings an amended statement of claim supercedes all previous statements of claim, yet this rule does not apply to the more liberal pleadings permitted in a fourth class case in the Municipal court. Garlin v. City of Chicago, 203 Ill. 564; Gilden v. Illinois Tunnel Co., 185 Ill. App. 638; Johnson v. Mueller, 192 Ill. App. 422; Emberg v. City of Chicago, 271 Ill. 404.

Plaintiff's testimony was, in substance, that he was an architect licensed to practice under the laws of the State of Illinois; that he knew the defendant and had a conversation with him in regard to the premises at 1446 South Wabash avenue, Chicago, in April, 1922; that defendant came to his home in an automobile and took him down to 1446 South Wabash avenue and told him that he intended to improve and remodel the property. Defendant took plain-

A statement made by the witness on the day of the trial.

1911.

To the best of my knowledge and belief, the following is a true and correct statement of the facts and circumstances as to the same.

My name is John A. Smith, and I am a resident of the City of Chicago, Illinois.

On the day of the trial, I was present at the trial and saw the witness.

The witness is a man of about 40 years of age, of medium height and build, with dark hair and eyes.

He is a native-born American, and is a resident of the City of Chicago, Illinois.

He is a member of the Chicago Police Department, and is a member of the Chicago Police Association.

He is a man of good character and reputation, and is a man of good standing in the community.

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tiff to the rear of the lot, showed him the building then on the premises and they made a general inspection. Defendant said he intended to improve this property with a seven-story mill constructed building on the rear of the lot and to remodel the front building. Defendant asked the cost and plaintiff says he told him the cost would be \$150,000, and his charge for architect's fees would be five per cent of this. Defendant said that this was satisfactory and told plaintiff to proceed immediately with the preliminary sketches and calculations. There were further interviews between the parties with reference to the details of the proposed building. Plaintiff subsequently introduced the defendant to two of his draftsmen, Weavers. Age and Maynard, and the proposed building was discussed by them. Appointments were made between plaintiff and defendant to meet at 1446 South Wabash avenue. Defendant repeated, in the presence of plaintiff's draftsmen, his intention to erect a seven-story building on the rear of the lot and to remodel the front part. Defendant also came to plaintiff's office frequently. Plaintiff's draftsmen prepared a layout of the building and plans, copies of which were mailed to defendant. In June defendant came to plaintiff's office and together with plaintiff's draftsmen, Mr. Age, they looked over the drawings; defendant said they were satisfactory and then again took up the matter of costs and made some figures and calculations in plaintiff's office; defendant then suggested that it would not be advisable for him to proceed with the \$150,000 building. Further calculations were made and defendant was told that it would cost about \$60,500 to build a three-story building. Defendant said that he wanted to think over the matter and see what arrangements he could make with tenants. Defendant did not make the contemplated improvements. Plaintiff and his draftsmen did the work of preparing all the plans. Blue prints of the same are in the record, consisting of ten or more sheets. Plaintiff testified that his two draftsmen

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worked on these drawings approximately forty or fifty days. Both draftsmen gave testimony tending to corroborate plaintiff's version.

Defendant does not deny that plaintiff performed the work which he claims to have done in preparing the plans. His version is that, when they discussed the proposed building, plaintiff proposed making some sketches for the seven-story building on the rear and that, when defendant asked what his charges would be for these sketches, plaintiff replied, "I won't charge you a cent for the sketches unless you go ahead with the building." Plaintiff, testifying in rebuttal, denied this.

Considering the variant stories of the witnesses, the court could properly be moved to accept the plaintiff's version. It is improbable that plaintiff would undertake to do this work, involving considerable expense to himself in the employment of draftsmen, to say nothing of his own time, upon a mere chance that he would be paid for his services. It is a legal presumption that one performing services for another expects to receive pay for the same. Furthermore, the court had the opportunity of observing the respective witnesses while testifying and could thus better judge of their credibility than can we. Considering the circumstances and the testimony of the witnesses, we are unable to say that the conclusion of the court is manifestly against the weight of the evidence.

It is said that, although plaintiff's claim declared as an implied contract, the evidence proved an express contract to pay five per cent on \$150,000. The evidence shows that the five per cent was based upon the actual construction of the building but this was not carried out by the defendant. Under such circumstances, plaintiff may sue and recover upon an implied contract for the reasonable value of his services. When one party refuses to

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carry out a contract, the other may recover upon a quantum meruit so far as he has performed. Guardon v. Gerbati, 97 Ill. 278; Stoncking v. Long, 142 Ill. App. 203.

Experts testified that, where the construction of the building was not carried out, the usual and reasonable charge for services for preparing preliminary plans was one per cent. Plaintiff's claim was apparently based upon the modified estimated cost of the building at \$60,000. If plaintiff chose to fix his claim at one per cent upon a building estimated to cost \$60,000, we do not see how defendant can be heard to complain. The amount of the finding was within the scope of the evidence and was proper.

We see no substantial reason for reversing, and the judgment is affirmed.

AFFIRMED.

Matchett, F. J., and O'Connor, J., concur.

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32693

LOUIS GOLDMAN, trustee for the
benefit of creditors of SLADE,
TENNEY & WEADLEY,

Appellant,

v.

P. N. NELSON COMPANY,
a corporation,

Appellee.

249 I.A. 637
6727a
APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE McRENNELLY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover for goods sold.

Summons was served on L. G. Agasim alleged to be an agent of defendant, which entered a special appearance for the purpose of objecting to the jurisdiction of the court and moved to quash the service and to dismiss the suit, which motion, after hearing, was allowed. From the order thereon plaintiff appeals.

The only evidence presented on the motion was a copy of the charter of the defendant company and the testimony of Agasim. The charter showed that defendant was a corporation organized to carry on the jewelry business with its principal place of business in Moline, Illinois.

Agasim testified that he was a public accountant, residing in Chicago, Illinois; that he has no other business in Chicago; that this business takes all of his time and is the only source of his income. That he is an auditor for the defendant, P. N. Nelson Company, a corporation located at Moline, Illinois; that defendant's business is running a retail jewelry store in Moline, and so far as he knew it carried on no business outside of Moline; that it had and did no business in Cook

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County. It did not have any agents, employees or representatives in Chicago or in Cook County and had no property of any kind here. The books and records were kept at Moline; that the only thing the witness did in connection with defendant's business was to make an annual trip to Moline and audit the books and make a report to the secretary of state. On the day he was served with summons, he was also the secretary and a director and stockholder of the defendant company. At the request of F. W. Nelson, he made an investigation in Mr. Goldman's office relating to the liquidation of a prior concern in which Mr. Nelson was interested. The proceeds were to go to Mr. Nelson. A letter to the witness dated March 9, 1927, was received in evidence, but on objection of the defendant was stricken as immaterial for the reason that it pertained to F. W. Nelson, individually, and not to the defendant company. Occasionally, Mr. Nelson, the defendant's president, came to Chicago to make purchases from the wholesale houses of merchandiser.

We held that the motion to quash the summons was properly sustained, as the defendant was not subject to the jurisdiction of the Municipal Court. Section 6, Chapter 110, Canill's Illinois Statutes, provides:

"It shall not be lawful for any plaintiff to sue any defendant out of the county where the latter resides or may be found * * *"

Section 8 provides:

"An incorporated company may be served with process, by leaving a copy thereof with its president, if he can be found in the county in which the suit is brought. If he shall not be found in the county, then by leaving a copy of the process with any clerk, secretary, superintendent, general agent, cashier, principal, director, engineer, conductor, station agent, or any agent of said company found in the county; * * *"

Section 6 fixes the county in which the suit may be brought, and Section 8, the manner of service in that county. As was said in Silabes v. Quincy Hotel Co., 30 Ill. App. 204:

"The corporation is found wherever it is doing business, but not everywhere that those engaged in its service may for their private business or pleasure stray."

The residence of a corporation necessarily must be where it exercises its corporate functions and this usually means where its business is done. Bristol v. C. & A. R. R. Co., 15 Ill. 436.

The evidence fails to show that defendant was doing business in Cook County. The fact that Agniss, its secretary and director, lived in Chicago does not make this the residence of the corporation. Agniss conducted none of the business of the corporation here, where his sole occupation was his own personal business or profession as an accountant. His only duties with reference to the defendant were to make an annual visit to Moline to audit its accounts and report to the secretary of state.

The letter of March 9 apparently relates to a matter personal to P. W. Nelson, and for this reason was held to be immaterial, but even if considered competent, it is not decisive of the point involved. It relates to a settlement of certain business matters which were in controversy with litigation impending. It has been held that transactions relating to such matters in controversy are not "doing business," as these words are used in the statute; that "doing business" refers to the transaction of the ordinary business in which the corporation is engaged. Alpena Cement Co. v. Jenkins, etc., Co., 344 Ill. 354. Furthermore, the letter was written March 9, but Agniss was not served until November 3, 1927. There is no evidence that he was representing the defendant at the time summons was served.

...the company is which the suit was brought.
and Section 8, the number of shares in that company. As was
said in Alfred W. Smith v. Smith, 121 N.Y. 100, 101.
"The corporation is a legal entity, it is not
personified, but it is a legal entity, it is not
the parties may be their business as
persons only."
The existence of a corporation necessarily means that there is
exercise of corporate functions and this usually means there
is business in some. Alfred W. Smith v. Smith, 121 N.Y. 100, 101.
The evidence fails to show that defendant was doing
business in Cook County. The fact that defendant, the corporation
and director, lived in Chicago was not made into the evidence
of the corporation. Again, the fact that the business of the
corporation here, where the sole stockholder is his own personal
business or partnership or partnership, the only thing with
reference to the defendant was to show no actual right to
control the business and control to the majority of stock.
The fact of having a partnership interest in a business
between the defendant and the other person was held to be
immaterial, but even if immaterial, it is not decisive
of the point involved. It relates to a partnership of certain
business matters which was in controversy with it being
immaterial. It has been held that "business" relating to such
matters in controversy was not "business," as these matters
are made in the record; that "business" relates to the
transaction of the ordinary business in which the corporation
is engaged. Alfred W. Smith v. Smith, 121 N.Y. 100, 101.
Furthermore, the letter was written March 5, 1937, and again
was not dated until November 2, 1937. There is no evidence
that he was representing the defendant at the time defendant was
served.

Cases holding the service of summons ineffectual are Schillinger Brothers Co. v. Henderson Brewing Co., 107 Ill. App. 336; Boez v. T. & P. Ry. Co., 250 Ill. 376; Farling & Co. v. E. Wash & Sons' Fertilizer Co., 242 Ill. App. 378.

The ruling of the trial court was proper upon the evidence produced, and its judgment is affirmed.

AFFIRMED.

Hatchett, B. J., and O'Connor, J., concur.

249 I.A. 637²

WILLIAM B. BROGLIANT,
Plaintiff in Error,

vs.

ERROR TO SUPERIOR COURT
OF COOK COUNTY.

AUGUST A. MEYER, JOHN E. AUSTIN,
ALLAN J. COLEMAN, JUSTIN K. ORVIS,
LOUIS VERNON, JAMES A. BILLINGS and
EUGENE A. LYON,
Defendants in Error.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action of assumpsit against the defendants to recover \$200 which he claimed he had paid the defendants for class "D" securities, basing his right of action on the Illinois Securities law, the point being that the defendants had failed to file certain documents in the office of the Secretary of State as required by that act. At the close of plaintiff's case, on motion of the defendant, substantially all of the evidence was stricken and the jury was directed to return a verdict in favor of the defendants. The verdict was returned accordingly, judgment entered upon it, and the plaintiff has sued out this writ of error.

Plaintiff in his brief states that the transactions in this case are identical with those involved in the cases of Wood v. Meyer, 240 Ill. App. 100, and McIlvaine v. Meyer, No. 29922, Appellate court, First District, opinion filed March 10, 1926, and relies for reversal upon these two cases. The record discloses that the facts in those two cases are identical with the facts in the instant case with the exceptions of the plaintiff and the amount involved.

Upon an examination of the record we find that the case of Wood v. Meyer was decided in the trial court by Judge Eller on April 4, 1924. In that case at the close of the plaintiff's evidence, on motion of defendants, the evidence was excluded and a directed verdict for the defendants returned. The plaintiff

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U.S. DEPARTMENT OF AGRICULTURE
WASHINGTON, D.C.

...L'UNIVERSITÉ DE PARIS, 1971-1972, 1973-1974, 1975-1976, 1977-1978, 1979-1980, 1981-1982, 1983-1984, 1985-1986, 1987-1988, 1989-1990, 1991-1992, 1993-1994, 1995-1996, 1997-1998, 1999-2000, 2001-2002, 2003-2004, 2005-2006, 2007-2008, 2009-2010, 2011-2012, 2013-2014, 2015-2016, 2017-2018, 2019-2020, 2021-2022, 2023-2024, 2025-2026, 2027-2028, 2029-2030, 2031-2032, 2033-2034, 2035-2036, 2037-2038, 2039-2040, 2041-2042, 2043-2044, 2045-2046, 2047-2048, 2049-2050, 2051-2052, 2053-2054, 2055-2056, 2057-2058, 2059-2060, 2061-2062, 2063-2064, 2065-2066, 2067-2068, 2069-2070, 2071-2072, 2073-2074, 2075-2076, 2077-2078, 2079-2080, 2081-2082, 2083-2084, 2085-2086, 2087-2088, 2089-2090, 2091-2092, 2093-2094, 2095-2096, 2097-2098, 2099-2100, 2101-2102, 2103-2104, 2105-2106, 2107-2108, 2109-2110, 2111-2112, 2113-2114, 2115-2116, 2117-2118, 2119-2120, 2121-2122, 2123-2124, 2125-2126, 2127-2128, 2129-2130, 2131-2132, 2133-2134, 2135-2136, 2137-2138, 2139-2140, 2141-2142, 2143-2144, 2145-2146, 2147-2148, 2149-2150, 2151-2152, 2153-2154, 2155-2156, 2157-2158, 2159-2160, 2161-2162, 2163-2164, 2165-2166, 2167-2168, 2169-2170, 2171-2172, 2173-2174, 2175-2176, 2177-2178, 2179-2180, 2181-2182, 2183-2184, 2185-2186, 2187-2188, 2189-2190, 2191-2192, 2193-2194, 2195-2196, 2197-2198, 2199-2200, 2201-2202, 2203-2204, 2205-2206, 2207-2208, 2209-2210, 2211-2212, 2213-2214, 2215-2216, 2217-2218, 2219-2220, 2221-2222, 2223-2224, 2225-2226, 2227-2228, 2229-2230, 2231-2232, 2233-2234, 2235-2236, 2237-2238, 2239-2240, 2241-2242, 2243-2244, 2245-2246, 2247-2248, 2249-2250, 2251-2252, 2253-2254, 2255-2256, 2257-2258, 2259-2260, 2261-2262, 2263-2264, 2265-2266, 2267-2268, 2269-2270, 2271-2272, 2273-2274, 2275-2276, 2277-2278, 2279-2280, 2281-2282, 2283-2284, 2285-2286, 2287-2288, 2289-2290, 2291-2292, 2293-2294, 2295-2296, 2297-2298, 2299-2300, 2301-2302, 2303-2304, 2305-2306, 2307-2308, 2309-2310, 2311-2312, 2313-2314, 2315-2316, 2317-2318, 2319-2320, 2321-2322, 2323-2324, 2325-2326, 2327-2328, 2329-2330, 2331-2332, 2333-2334, 2335-2336, 2337-2338, 2339-2340, 2341-2342, 2343-2344, 2345-2346, 2347-2348, 2349-2350, 2351-2352, 2353-2354, 2355-2356, 2357-2358, 2359-2360, 2361-2362, 2363-2364, 2365-2366, 2367-2368, 2369-2370, 2371-2372, 2373-2374, 2375-2376, 2377-2378, 2379-2380, 2381-2382, 2383-2384, 2385-2386, 2387-2388, 2389-2390, 2391-2392, 2393-2394, 2395-2396, 2397-2398, 2399-2400, 2401-2402, 2403-2404, 2405-2406, 2407-2408, 2409-2410, 2411-2412, 2413-2414, 2415-2416, 2417-2418, 2419-2420, 2421-2422, 2423-2424, 2425-2426, 2427-2428, 2429-2430, 2431-2432, 2433-2434, 2435-2436, 2437-2438, 2439-2440, 2441-2442, 2443-2444, 2445-2446, 2447-2448, 2449-2450, 2451-2452, 2453-2454, 2455-2456, 2457-2458, 2459-2460, 2461-2462, 2463-2464, 2465-2466, 2467-2468, 2469-2470, 2471-2472, 2473-2474, 2475-2476, 2477-2478, 2479-2480, 2481-2482, 2483-2484, 2485-2486, 2487-2488, 2489-2490, 2491-2492, 2493-2494, 2495-2496, 2497-2498, 2499-2500, 2501-2502, 2503-2504, 2505-2506, 2507-2508, 2509-2510, 2511-2512, 2513-2514, 2515-2516, 2517-2518, 2519-2520, 2521-2522, 2523-2524, 2525-2526, 2527-2528, 2529-2530, 2531-2532, 2533-2534, 2535-2536, 2537-2538, 2539-2540, 2541-2542, 2543-2544, 2545-2546, 2547-2548, 2549-2550, 2551-2552, 2553-2554, 2555-2556, 2557-2558, 2559-2560, 2561-2562, 2563-2564, 2565-2566, 2567-2568, 2569-2570, 2571-2572, 2573-2574, 2575-2576, 2577-2578, 2579-2580, 2581-2582, 2583-2584, 2585-2586, 2587-2588, 2589-2590, 2591-2592, 2593-2594, 2595-2596, 2597-2598, 2599-2600, 2601-2602, 2603-2604, 2605-2606, 2607-2608, 2609-2610, 2611-2612, 2613-2614, 2615-2616, 2617-2618, 2619-2620, 2621-2622, 2623-2624, 2625-2626, 2627-2628, 2629-2630, 2631-2632, 2633-2634, 2635-2636, 2637-2638, 2639-2640, 2641-2642, 2643-2644, 2645-2646, 2647-2648, 2649-2650, 2651-2652, 2653-2654, 2655-2656, 2657-2658, 2659-2660, 2661-2662, 2663-2664, 2665-2666, 2667-2668, 2669-2670, 2671-2672, 2673-2674, 2675-2676, 2677-2678, 2679-2680, 2681-2682, 2683-2684, 2685-2686, 2687-2688, 2689-2690, 2691-2692, 2693-2694, 2695-2696, 2697-2698, 2699-2700, 2701-2702, 2703-2704, 2705-2706, 2707-2708, 2709-2710, 2711-2712, 271

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the People of the East (CLPE) in the United States. The Commission is therefore unable to provide any information regarding the activities of the CLPE in the United States.

[illegible]

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the People of the South (CLPS) in the United States. This is a serious omission, as the Commission is unable to assess the extent of the Committee's activities or the impact of its propaganda campaign.

sued out a writ of error from this court and upon consideration the judgment of the trial court was reversed and the cause remanded, the opinion being filed March 10, 1926. Thirteen days later, viz. March 23, 1926, the writ of error in the instant case was sued out. The record discloses that the trial of the case before us was before Judge David on March 31, 1924, and the judgment was entered the next day, April 1, 1924, or three days before the judgment was entered in Wood v. Meyer. So the opinion of this court was not written until long after both cases were decided. It further appears from the record that the same counsel were in both cases; and although plaintiff in the instant case contends that the judgment should be reversed on the authority of Wood v. Meyer, yet we find upon examination of the brief filed by defendants in error that no mention is made of the opinion rendered in the Wood case. There is no contention that it was unsound in any particular. In fact an examination of the brief filed on behalf of the defendants in error discloses the fact that it is almost identical with the brief filed by the defendants in error in the Wood case. We have examined the record in this case and find it the same as the record in the Wood case, and for the reasons stated in the Wood case the judgment of the Superior court of Cook county is reversed and the cause remanded.

REVERSED AND REMANDED.

Hatchett, P. J., and McSurely, J., concur.

and was a wife of mine from this date and upon separation
the plaintiff of the said wife was provided for and was furnished
the opinion being filed before me, 1902. This was done by me.
March 11, 1902, the wife of mine in the instant case was made
The record discloses that the trial of the case before me was before
Judge Davis on March 11, 1902, and was adjourned and ended the same
day, March 1, 1902, on which day before me the husband was sworn in
Judge J. J. Davis. He was sworn in on this date and was sworn in
Judge J. J. Davis was sworn in. It is further stated that the
witnesses who were sworn in were sworn in and sworn in.
Exhibits in the instant case were sworn in and sworn in.
He presided on the trial of the instant case and was sworn in
witnesses of the trial of the instant case in which he was sworn in
to take of the instant case on the 11th day of March, 1902, in the
case filed in the instant case on the 11th day of March, 1902, in the
of the instant case on the 11th day of March, 1902, in the
the instant case is to be sworn in and sworn in by me.
Exhibits in the instant case on the 11th day of March, 1902, in the
in the instant case on the 11th day of March, 1902, in the
in the instant case on the 11th day of March, 1902, in the
The instant case on the 11th day of March, 1902, in the
of the instant case on the 11th day of March, 1902, in the
of the instant case on the 11th day of March, 1902, in the

Witnesses: J. J. Davis, J. J. Davis, J. J. Davis.

267 - 32208

ALBIN ANDERSON,
Plaintiff in Error,

v.

HARRY GLISKER et al.,
Defendants in Error.

249 A. 637³

ERROR TO SUPERIOR COURT,
COOK COUNTY.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action to recover damages for malicious prosecution and false arrest against the defendants. They filed pleas of the general issue. About a year afterwards, viz., April 6, 1927, the case was reached on the trial calendar but the defendants failed to appear. A jury was then impanelled and after hearing they found the defendants guilty and assessed plaintiff's damages at \$2500, and judgment was entered on the verdict. After the expiration of the term at which the judgment was entered and during the month of May, the defendant Harry Glisker was taken into custody under a writ of capias ad satisfaciendum and afterwards proceedings were had under the insolvent debtor's act in the county court. On June 14, 1927, plaintiff filed a petition in the instant case which was supported by affidavits, and we must presume that it was made under section 89 of the Practice Act. In addition to the petition and affidavits in support of it, two witnesses were examined and at the conclusion the court entered an order on June 14, 1927, vacating and setting aside the judgment, from which plaintiff appeals. Afterwards he sued out a writ of error from this court.

While it appears from the record that on the hearing of defendants' motion to vacate and set aside the judgment the parties were somewhat unfamiliar with the law and procedure under

2481 A. 687



RE. PETITION OF JAMES H. HARRIS FOR WRIT OF HABEAS CORPUS.

Plaintiff brought an action to recover damages for
malicious prosecution and libel against the defendant.
They filed a bill of the general issue. About a year afterwards,
April 8, 1917, the case was reached on the trial calendar
and the defendant failed to appear. The plaintiff
was then ordered to show cause why the judgment should not be entered
against him. A return of 1917, and judgment was entered on the
verdict. After the expiration of the term at which the judgment
was entered and during the month of May, the defendant wrote
plaintiff and asked him to visit at his home.
Plaintiff and defendant's attorneys were not under the
impression that the defendant was not in the county court. In June, 1917,
plaintiff filed a petition in the county court which was supported
by affidavits, and it was presumed that it was made under duress
of the plaintiff. In addition to the petition and affidavits
in support of it, two witnesses were examined and of the defendant
the court ordered to show cause on June 11, 1917, why judgment and writ
should not be entered. From which plaintiff appealed. The court
then ordered a writ of error from this court.
This is removed from the record book on the finding
of defendant's motion to vacate and set aside the judgment and
petition with costs, and plaintiff's bill for damages and costs.

section 89 of the Practice Act, yet we think the record is such that we must pass upon the merits of that proceeding. The basis of defendant's motion to vacate the judgment was that he had not been served with the summons and that his appearance had been entered by an attorney at law without authority, so that he was not properly before the court. Of course, if the summons was properly served upon him he would not be in a position to raise the second question in this proceeding. The entry of his appearance by counsel is immaterial.

The precise question now under consideration was decided against defendant's contention in Chapman v. No. American Ins. Co., 292 Ill. 179. (See also Marabia v. Thompson Hospital, 309 Ill. 153; Precision Products Co. v. Cady, 233 Ill. App. 77.) In the Chapman case it was held that the return of the sheriff, regular on its face, could not be contradicted under the motion substituted for the common law writ of error scram nobis, unless plaintiff had fraudulently procured the sheriff to make a false return. There is no such contention in the instant case and the motion to vacate the judgment should have been denied. But the defendant contends that the order of the court vacating the judgment was not a final order. This question has also been definitely settled against the defendant's contention. Cramer v. Commercial Men's Assn., 360 Ill. 519. The rule announced in that case has not been departed from.

The defendant also contends that the judgment entered in the suit in favor of the plaintiff is invalid in certain particulars which are pointed out in the brief filed in his behalf. These are answered by counsel for plaintiff, but we think the question is not before us in this proceeding. The

judgment has heretofore been set aside and vacated on defendant's motion and plaintiff has sued out a writ of error to reverse that order; obviously the question of the validity of the judgment is not involved in this proceeding.

The order of the Superior Court of Cook County is reversed.

REVERSED.

Hatchett, P. J., and McBurely, J., concur.

32289

243 1 637^t

THOMAS J. GRADY,
Appellant,

vs.

THOMAS MALONEY,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

We have this day filed an opinion in the case No. 32291, and for the reasons therein stated the judgment of the Municipal court of Chicago is affirmed.

AFFIRMED.

Hatchett, F. J., and McBurely, J., concur.

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32290

THOMAS J. GRADY,
Appellant.

vs.

THOMAS MALONEY,
Appellee.

249-1637
6737a
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

We have this day filed an opinion in case No. 32291,
and for the reasons therein stated the judgment of the Municipal
court of Chicago is affirmed.

AFFIRMED.

Ketchett, P. J., and McSurely, J., concur.

688 689

[Handwritten signature]

THOMAS A. SWANN
 President
 of the
 Board of Directors

THE BOARD OF DIRECTORS OF THE COMPANY

We have this day filed an opinion in case No. 10001,
 and for the reasons therein stated the judgment of the National
 Board of Directors is affirmed.

ATTEST:

Witness, to the fact and contents of the foregoing,

THOMAS J. GRADY,
Appellant,

32289 vs.

THOMAS MALONEY,
Appellee.

THOMAS J. GRADY,
Appellant,

32290 vs.

THOMAS MALONEY,
Appellee.

ERIC A. HOELTER,
Appellant,

32291 vs.

THOMAS MALONEY,
Appellee.

637
730
APPEALS FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

In the three above entitled causes judgments by confession were entered in the Municipal court of Chicago in favor of the plaintiff and against the defendant. Afterwards the judgments were opened up and leave was given defendant to make his defenses. The three cases were consolidated for hearing and submitted to the court without a jury. After hearing the evidence the court found in favor of the defendant in two of the cases and judgments were entered on the findings. In the other case the court found the issues in favor of the plaintiff but reduced the judgment from \$11,394.44 to \$6623.41, and it is to reverse the three judgments that plaintiff prosecutes these appeals, which have been submitted upon one set of abstracts and briefs.

The record discloses that plaintiff, Thomas J. Grady, and defendant, Thomas Maloney, are cousins. Grady appears to have been a man of some means and owned some real estate in Chicago.

Maloney, who was a carpenter and builder, was constructing a building for himself and to enable him to do so had borrowed some money from Grady. Afterwards in the year 1925 the parties entered into an oral agreement whereby Maloney was to erect for Grady two three-flat buildings on lots owned by Grady. The property was located on North Francisco avenue, Chicago, and was known as Nos. 6418 and 6532. By the terms of the agreement plaintiff was to furnish the money and the lots and the defendant was to procure the material and furnish the labor and construct the buildings, for which he was to be paid carpenter's wages by plaintiff and in addition receive one-half of the profit when the buildings were sold. Afterwards Maloney started to construct the buildings and about that time plaintiff, without the knowledge of defendant, transferred the title to the two lots to the defendant, and it being necessary shortly thereafter to raise money with which to construct the building, he requested defendant to sign an application for a loan of \$14,000 on each piece of property and to execute the necessary notes and mortgages evidencing these sums. The money was loaned by R. G. Paulding and Syndacker & Co. and with the proceeds of these loans, together with moneys advanced by plaintiff, the buildings were constructed by defendant and completed about October 1st, 1925. The building at 6418 North Francisco avenue cost \$19,720 and that at No. 6532 North Francisco avenue \$19,435. Each building cost about \$2,000 more than the estimate. The money had been paid out under Grady's supervision and through his office.

About the time the buildings were completed Grady sent for defendant who went to Grady's office, where Grady had a prepared statement of the account between them. The account showed the situation between the parties not only with reference to the two buildings on North Francisco avenue but also included some money which Maloney had theretofore borrowed from Grady. In this account, pre-

pared by Grady, each of the lots was valued at \$2750, and the total amount which Grady claimed from Maloney, including the value of the two lots, was \$23,094. Grady testified that at that time he told Maloney all he wanted out of the two buildings was the money he had invested in them, that after he received his money Maloney could keep any profit there might be. Maloney denies that there was such an agreement; but his testimony on this point and as to what the agreement was is not entirely satisfactory; but in the view we take of this case this is not of serious moment.

October 1st, when this written statement was being considered by the parties, Maloney paid Grady \$3,000, leaving a balance due him, if we take Grady's version of the transaction as true, of \$20,094. It is apparent from the evidence that at that time Maloney had no money with which to pay Grady the amount Grady claimed was due, that Grady was well aware of this fact and thereupon requested Maloney to execute two notes for \$10,000 each, to be secured by second mortgages on the two buildings, in payment of the amount claimed. Maloney did this and at that time Grady also stated that in order for him to get his money out of the property it would be necessary to discount the two \$10,000 notes; that the discount would be 15 per cent or \$3,000; that he did not want to stand this \$3,000 and requested Maloney to give him another note for this amount, which Maloney did, the note, however, being for \$3,094, due six months after date and bearing interest at 6 per cent after date. This is one of the notes upon which plaintiff had judgment confessed. The written account or statement then shows that Grady gave Maloney a credit of \$17,000, being the face of the two \$10,000 notes less the discount of \$3,000. This \$17,000 deducted from the \$20,094, being the balance due from the defendant as shown by the statement, left a balance due of \$3094, and it is for this amount that the note just mentioned was given. This agreement was signed by both

given by Grady, one of the facts was stated as follows, and the fact
 amount which Grady claimed from Grady, including the value of the
 two facts, was \$10,000. Grady testified that at that time he paid
 Grady all he could out of the two million and the money he
 had received from him, and that after he received his money Grady would
 keep any profit there might be. Grady stated that he was not
 an agreement, but his intention on this point was to have the
 agreement was in fact entirely satisfactory; and in the view of this
 of this case and it was not a binding contract.
 October 1st, when this witness statement was being con-
 sidered by the parties, Grady said Grady \$10,000, leaving a balance
 due him, if he gave Grady's version of the transaction as true, of
 \$20,000. It is apparent from the statement that at that time Grady
 had no money with which to pay Grady the money Grady claimed was
 due, that Grady was well aware of this fact and Grady's statement
 Grady to receive two notes for \$10,000 each, to be secured by
 second mortgages on the two buildings, in payment of the amount
 claimed. Grady said that he was not the Grady who stated that
 he paid for the two buildings and the property is would be
 necessary to demand the two \$10,000 notes; that the document would
 be in his name as \$10,000; that he did not want to receive this \$10,000
 and transfer Grady to give him interest rate for this amount, which
 Grady did, the notes, however, being for \$10,000, and the amount
 at that time and having interest at 8 per cent after date. This is
 one of the notes upon which Grady had a claim, mentioned. The
 written account of statement was given that Grady gave Grady a
 draft of \$10,000, being the sum of the two \$10,000 notes less the
 amount of \$1,000. This \$10,000 balance from the \$10,000, being
 the balance due from the statement as given by the statement, is
 a balance due of \$10,000, and it is for this amount that the note
 had mentioned the Grady. This agreement was signed by both

parties. Apparently Grady was unable to discount the notes and retained them.

The evidence without dispute further shows that although plaintiff had transferred the title to the two properties to Maloney and had taken Maloney's notes for the amount he claimed was due him, he continued to exercise ownership over the property just as though he still retained the title. He rented the properties, collected the rents and in fact continued to exercise complete dominion over them.

The evidence further shows that about this time plaintiff was contemplating erecting another building on property owned by him on North California avenue, and requested Maloney to get an estimate of the cost of the proposed building. Maloney testified that he did this and submitted the matter to Grady, the estimated cost being \$21,500; that this estimate was for a building 50 feet in width and two stories in height; that Grady objected to this, saying he wanted a three-story building, the first story to consist of stores and the two upper floors of flats or apartments; that thereupon, at plaintiff's request, Maloney obtained an estimate of the cost of such a building; that the estimate was \$34,390, which he submitted to Grady who told him to go ahead with the building, saying that Maloney would be paid \$1,000 for superintending the building. The money was all to be advanced by Grady. It further appears that about this time Grady was taken ill and was away from Chicago for some months; that Maloney immediately began to construct the building and obtained money, from time to time, from Grady's office as Grady had instructed; that as the building progressed defendant drew money as follows:

Будет ли это означать, что в будущем мы сможем избежать катастрофы, связанной с ядерной энергией? Нет, конечно. Но мы сможем избежать катастрофы, связанной с ядерной энергией, если мы сможем избежать катастрофы, связанной с ядерной энергией.

 $\lim_{n \rightarrow \infty} \frac{f(n)}{g(n)} = L$, $f(0) = g(0) = 0$.

[Faint, illegible handwriting]

Abstracts not presented for publication in this issue are available in following

and the fact that the system is not yet fully operational.

THE UNIVERSITY OF CHICAGO PRESS

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There is a small collection of handwritten notes in the left margin.

— 1999

The following table shows the number of cases of

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2008年12月10日，中国铝业公司（以下简称“中铝集团”）与加拿大铝业集团（以下简称“加铝集团”）宣布，双方同意以各自拥有的全部铝资产为基础，共同组建一家新的全球性铝业公司。该新公司将成为全球最大的铝业公司，其总资产将超过1000亿美元，年产量将超过1000万吨。新公司的成立，标志着全球铝业格局发生了重大变化，也标志着中国铝业公司正式进入全球铝业竞争舞台。

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ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED DATE 05-20-2010 BY 60322

Journal of the Royal Society of Medicine, 1911, vol. 4, p. 100.

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20 - William W. Woodbridge, Jr., Treasurer of William W. Woodbridge, Jr., and wife

no other, and all are believed to have resulted as shown in Table 1.

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Received 15 November 2005; accepted 15 November 2005

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September 9, 1925,	\$5,000.
" 10, 1925,	5,000.
October 8, 1925,	10,000.
November 7, 1925,	8,000.
December 17, 1925,	5,000.
January 21, 1926,	<u>1,390.</u>
Total,	\$34,390.

It further appears that in January, 1926, the building at No. 5418 North Francisco avenue was sold for cash, except the incumbrance secured by a first mortgage of \$14,000; that part of this cash payment paid one of the \$10,000 notes executed by the defendant to plaintiff about October 1, 1925, as above stated, and that there was a profit of \$1886.06 derived from the sale of this building. The money was all paid by the purchaser to Grady who applied the \$1886.06 profit on the Maloney note of \$3,094. In arriving at the profit derived from the sale of this building, the rents obtained by plaintiff and the disbursements made by him were taken into consideration.

The evidence further shows that when Maloney drew the \$10,000 on October 8, 1925, which he says was on account of the cost of the building on North California avenue, he made his note for that amount payable to plaintiff and delivered it to him; that note was due one year after date, bore interest at six per cent, and is one of the notes on which plaintiff had judgment by confession. The evidence further shows that Grady transferred the title to the property on North California avenue to Maloney and it remained in Maloney's name for a short time, when he re-conveyed it to Grady, and there is no claim that Maloney ever had any other interest in this piece of property. The building at No. 6532 North Francisco avenue has not yet been sold, although Maloney testified that he at one time obtained a purchaser for it but Grady would not permit the sale to be made. This building has always been under the exclusive control of Grady, he renting the property, collecting the rents and making some disbursements. The

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It is further stated that in January, 1934, the following

as per this record transaction between the said parties, namely the

assessments assessed by a third party at \$12,000, and of

this same amount paid one of the parties before recorded by the

defendant in plaintiff's account dated 1, 1934, on which record, the

that there was a receipt of \$12,000 between them and one of said

plaintiff. The money was all paid by the defendant to satisfy the

plaintiff and \$12,000 paid to the plaintiff dated 1, 1934. The

plaintiff of the plaintiff's account from the date of said plaintiff.

The funds obtained by plaintiff and the defendant made by him

were used for plaintiff's.

The defendant further stated that when plaintiff from the

\$12,000 on October, 1934, said he was not on account of the

most of the plaintiff on said plaintiff's account, he was not

for that amount paid by the plaintiff and defendant as to this;

that note was not paid until later, when plaintiff as his part

went, and is one of the notes on which plaintiff and defendant

mentioned. The plaintiff further stated that when plaintiff

the title to the property on which plaintiff's account is being

and it remained in plaintiff's name for a short time, then it was

conveyed to the plaintiff, and there is no other record there and

any other interest in this kind of property. The plaintiff as to

that when plaintiff's account was not paid until, although plaintiff

stated that he at one time obtained a judgment for it but

that would not permit him to do so. The plaintiff was

always been under the conviction of being, he wanted the

property, collecting the same and selling same elsewhere.

trial court found that at the trial there was a deficit of \$483.03 and that the receipts were less than the disbursements on this building.

Plaintiff caused judgments to be entered on the three notes which he held. On the note for \$3094 the judgment was for \$1347.56, which was the amount plaintiff claimed after he had credited the sum of \$1886.06 profit derived from the sale of the building at 6418 North Francisco avenue, and which judgment included \$50 attorneys' fees. Another judgment was entered on the note for \$10,000, dated October 8, 1925, in the sum of \$10,860, which included interest and \$50 attorneys' fees. The third judgment was entered on the note for \$10,000 secured by a second mortgage on the property at No. 6532 North Francisco avenue, the amount of which judgment was \$11,364.44, including interest on the note and \$500 attorneys' fees. The defendant's motions to open up the judgments and for leave to defend were supported in the two \$10,000 note cases by affidavits which were ordered to stand as his affidavits of merits. There was no affidavit filed in the motion to open up the judgment on the note for \$3094, but on the trial the three cases were heard as one by agreement, and no point was made that defendant had failed to file any affidavit of defense to this note. The trial court found that this note was usurious and without consideration, also that the \$10,000 which defendant had obtained from plaintiff on October 8, 1925, and which was evidenced by defendant's note of that date, was used by defendant in paying for the construction of the building on North California avenue; that therefore plaintiff was not entitled to judgment on either of these two notes; and accordingly judgments were entered for defendant in these two cases.

On the other \$10,000 note which was secured by a second mortgage on the property at No. 6532 North Francisco avenue,

1919 every year, and in 1920, 1921 and 1922, the same amount was paid. The total amount paid for the year 1923 was \$10,000.00.

The following is a list of the names of the persons who have been paid for the year 1923, and the amount paid to each of them. The names are listed in alphabetical order, and the amounts are listed in dollars and cents. The total amount paid for the year 1923 was \$10,000.00.

1. John A. Smith, \$1,000.00
2. Mary B. Jones, \$800.00
3. Robert C. Brown, \$700.00
4. Elizabeth D. White, \$600.00
5. William E. Black, \$500.00
6. James F. Green, \$400.00
7. Sarah G. Hall, \$300.00
8. Charles H. King, \$200.00
9. David I. Lee, \$100.00
10. Anne J. Miller, \$100.00
11. Thomas K. Wilson, \$100.00
12. Margaret L. Young, \$100.00
13. Henry M. Adams, \$100.00
14. Elizabeth N. Baker, \$100.00
15. William O. Clark, \$100.00
16. James P. Evans, \$100.00
17. Sarah Q. Foster, \$100.00
18. Charles R. Gibson, \$100.00
19. David S. Harris, \$100.00
20. Anne T. Ingram, \$100.00
21. Thomas U. Jackson, \$100.00
22. Margaret V. Kelly, \$100.00
23. Henry W. Lewis, \$100.00
24. Elizabeth X. Martin, \$100.00
25. William Y. Nelson, \$100.00
26. James Z. Phillips, \$100.00
27. Sarah A. Reed, \$100.00
28. Charles B. Scott, \$100.00
29. David C. Turner, \$100.00
30. Anne D. Walker, \$100.00
31. Thomas E. Young, \$100.00
32. Margaret F. Adams, \$100.00
33. Henry G. Baker, \$100.00
34. Elizabeth H. Clark, \$100.00
35. William I. Evans, \$100.00
36. James J. Foster, \$100.00
37. Sarah K. Gibson, \$100.00
38. Charles L. Harris, \$100.00
39. David M. Ingram, \$100.00
40. Anne N. Jackson, \$100.00
41. Thomas O. Kelly, \$100.00
42. Margaret P. Lewis, \$100.00
43. Henry Q. Martin, \$100.00
44. Elizabeth R. Nelson, \$100.00
45. William S. Phillips, \$100.00
46. James T. Reed, \$100.00
47. Sarah U. Scott, \$100.00
48. Charles V. Turner, \$100.00
49. David W. Walker, \$100.00
50. Anne X. Young, \$100.00
51. Thomas Y. Adams, \$100.00
52. Margaret Z. Baker, \$100.00
53. Henry A. Clark, \$100.00
54. Elizabeth B. Evans, \$100.00
55. William C. Foster, \$100.00
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59. David G. Jackson, \$100.00
60. Anne H. Kelly, \$100.00
61. Thomas I. Lewis, \$100.00
62. Margaret J. Martin, \$100.00
63. Henry K. Nelson, \$100.00
64. Elizabeth L. Phillips, \$100.00
65. William M. Reed, \$100.00
66. James N. Scott, \$100.00
67. Sarah O. Turner, \$100.00
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94. Elizabeth P. Gibson, \$100.00
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96. James R. Ingram, \$100.00
97. Sarah S. Jackson, \$100.00
98. Charles T. Kelly, \$100.00
99. David U. Lewis, \$100.00
100. Anne V. Martin, \$100.00

The total amount paid for the year 1923 was \$10,000.00. The names of the persons who have been paid for the year 1923 are listed in alphabetical order, and the amounts are listed in dollars and cents.

the court found there was a balance due plaintiff of \$6623.41, which included \$500 attorneys' fees, and reduced the judgment which had theretofore been entered by confession in the sum of \$11,399.44 to \$6623.41.

Plaintiff contends that each of the three judgments should have been confirmed and that the court erred in failing to do so. Some argument is made in this court that the question of usury was improperly considered by the trial Judge because there was no such plea interposed. Other argument is made to the effect that neither the defense made nor the conclusions reached by the court were warranted by the defenses pleaded. No such contention was made on the trial. All of the evidence was offered and received and no point was made that it was not within the pleadings. It is elementary that such a contention cannot be urged for the first time in a court of review. Moreover, there is no merit in the contentions.

As to the note for \$3094, we think the undisputed evidence is that it was without consideration except as to \$94, which item appears to have been claimed for the first time in this court. The undisputed evidence is that Grady throughout the entire transactions dominated all matters. He was the moneyed man and Maloney did what Grady requested or demanded. About October 1st, when the parties signed the written statement of account prepared by Grady, he demanded a note for \$3,000 to make up the \$20,000 which he claimed was due him because he would be required to allow a discount of \$3,000 on the two \$10,000 notes. Again, when one of the buildings was sold in January, 1926, he received payment of one of the \$10,000 notes with interest in full; and the judgment entered on the other \$10,000 note executed at that time is for the face of the note with interest and attorney's fees less credits to which defendant is entitled. Plaintiff has the full amount of the two \$10,000 notes and has sustained no loss on account of any discount.

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Dr. J. H. H. H. H.

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It is requested that you advise this office of any change in the status of the above-named individual. Your attention is directed to the fact that the Bureau is currently conducting an investigation of the activities of the individual named above. It is requested that you advise this office of any change in the status of the above-named individual. Your attention is directed to the fact that the Bureau is currently conducting an investigation of the activities of the individual named above.

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Although the item of \$94 above mentioned appears to have been overlooked by all of the parties on the trial, yet we are of the opinion that in this case plaintiff should be allowed this sum. Plaintiff credited upon this note the \$1886.06, being the profit due to defendant from the sale of No. 6418 North Francisco avenue, and since there was but \$94 of this note which defendant owed, we will here credit plaintiff with the \$94 by deducting it from the profit above mentioned.

We are also of the opinion that the trial court was right in finding that the \$10,000 received by the defendant from the plaintiff October 9, 1928, was used by the defendant to pay a part of the cost of the construction of the building on North California avenue. The evidence clearly shows that when defendant agreed to construct that building for plaintiff, the cost of it was merely estimated. This is borne out by all the evidence. Plaintiff testified that the building was to cost \$21,500, but he admits that he paid defendant \$34,390; and we think the evidence clearly shows that defendant actually paid out more than \$35,000 in the construction of this building. He offered in evidence his cancelled checks showing that the actual cost was \$35,641.33. When we consider the size of this building and compare the cost of it with those constructed on North Francisco avenue, and when we consider the application for the loan made on this building and other facts and circumstances in evidence, we are clearly of the opinion that the court was warranted in finding, in effect, that the building cost \$34,390. This being a fact, obviously plaintiff is not entitled to recover on this note; and he makes no contention that he would be entitled to judgment on this note if the California avenue building cost \$34,390. We think the judgment in this case entirely warranted by the evidence.

There was no error in the ruling of the court excluding

the auditor's report offered on behalf of plaintiff. The account is as easily understood from the items offered in evidence as it would be from the auditor's account. It is not clear that plaintiff's books were in court; in fact counsel for defendant in his brief made the specific point that they were not; therefore the offered report of the auditor was properly excluded. Although plaintiff filed a reply brief, no answer is made to this contention. The books were not at all voluminous, and if they were not in court - as we think they were not - the offered report would not be admissible. Hochschild v. Goddard Tool Co., 233 Ill. App. 56. But in any event the ruling was proper for the reason first above stated.

On the third note for \$10,000, secured by a second mortgage on the property at No. 6532 North Francisco avenue, we think the court was in error in computing the amount due. The court rendered an opinion in the case which has been very helpful. In arriving at the amount the court properly applied the profit derived from the sale of the building at No. 6418 North Francisco avenue and also took into consideration the receipts and disbursements derived from the two buildings on that street, together with other items. Having found that there was nothing due on the note for \$3094, the court was warranted in applying the profit defendant was entitled to, on the note on which there was a balance due. On this phase of the case the court in his opinion said: "It is not disputed that during the relationship existing between the parties the plaintiff paid to the defendant \$20,094.00," being moneys loaned and advances made, together with accrued interest. The court then continues saying the accounting and credits the defendant with \$3,000 paid October 1, 1925, - the time plaintiff submitted his statement of account. In this the court was in error. The amount due plaintiff as shown by the statement was \$23,094,

deducting the \$3,000 payment made by defendant on that date, there was a balance of \$20,094.

We find the amount due on the \$10,000 note as follows: Face of note \$10,000; interest thereon at 7 per cent from October 1, 1925, the date of the note, to January 11, 1927, (when the judgment was confessed, \$376.93; deficit caused by difference in receipts from property at No. 6532 North Francisco avenue, and disbursements thereon, \$463; attorneys' fees \$500; total \$11,350.93. From this must be deducted \$1798.06, being the balance of the profit derived from the sale of the building at No. 6418 North Francisco avenue after deducting the \$94; \$201.37 being the amount collected on the Creme note; \$318 repairs on office made by the defendant; \$150 deposited on lot No. 34; and \$75 for three seats in the Cartmann building, or a total of \$2536.43. This sum must be deducted from the \$11,350.93, leaving a balance due plaintiff of \$9323.50, for which sum plaintiff is entitled to a judgment.

The judgment of the Municipal court in case No. 32289 is affirmed, as is also the judgment of the Municipal court in case No. 32290. The judgment of the Municipal court in case No. 32291 is reversed and the judgment of that court is confirmed for \$9323.50. Plaintiff will be required to pay all costs involved in these appeals.

JUDGMENT AFFIRMED IN CASES NOS. 32289 - 32290.

JUDGMENT IN CASE NO. 32291 AFFIRMED AS
MODIFIED.

Matchett, P. J. and McGuirely, J., concur.

and a balance of \$10,000.

[illegible][illegible]

From this time he remained in the United States, and was not again in the service of the Government.

On the 10th of May, 1964, the following information was received from the Bureau of the Census, Washington, D.C.:

[illegible]

is attached, as is also the statement of the Manager of the
case No. 2000. The statement of the Manager of the case No.
2000 is returned and the statement of the Manager of the case No.

RECEIVED BY THE DIRECTOR OF THE FBI ON MAY 10, 1968

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249 L.A. 638

PEABODY COAL COMPANY,
a Corporation,
Appellant,

vs.

JAMES COX DAVIS, Agent,
Appellee.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action of assumpsit against the defendant to recover \$60,136.25 which it had paid to the United States Government as "profits tax" on profits derived by it from the sale and delivery of coal to the Chicago, Rock Island & Pacific Railway Co. The coal was delivered during the time the railroads were under Federal control on account of the Great War. At the close of plaintiff's case, on motion of the defendant there was a directed verdict in his favor, judgment was entered on the verdict and plaintiff appeals.

The contract for the purchase and sale of the coal was in writing. Plaintiff's claim is that the profits tax which he was required to pay the Government was part of the purchase price of the coal bought by the defendant from it; that the contract in this respect was ambiguous and therefore the parol evidence offered by it on the trial for the purpose of removing the ambiguity was erroneously excluded. On the trial of the case plaintiff took the position that the contract entered into between the parties was ambiguous and offered evidence, oral and documentary, of negotiations had by the parties prior to the execution of the contract. Upon objection by the defendant the evidence was excluded on the ground that to admit it would violate the parol evidence rule.

The sole question before us for decision is the construction of the written contract and whether it is plain or ambiguous in its terms. The contract is dated April 23, 1917, and

provides for the delivery of a great deal of coal by plaintiff to the Rock Island Ry. Company, covering a period of a number of years. The contract states that plaintiff, the seller of the coal, owns or controls "certain coal properties, including reserve coal lands now owned or on which rental is paid," located in Sangamon and Christian counties of this state and that it operates a number of coal mines. The contract provides that the coal is to be paid for on the basis of the cost of the coal to plaintiff plus 10 per cent. The material parts of the contract on this question are:

"Section 4. The price to be paid by the Buyer for the coal sold and to be delivered by the Seller under the terms of this agreement, shall, as to each month, of the term hereof, be determined by taking the sum of (a) the total cost to the Seller during such month, ascertained or determined as hereinafter set forth, of all coal delivered *****during such month under the terms hereof, and (b) ten (10) per cent. of such total cost as a net profit to the Seller.

The total cost of said coal to the Seller, as referred to in clause (a) above, shall be that proportion of the sum of all items of cost of all of the coal produced during such month from all mines operated hereunder in both of said groups, which the tonnage delivered hereunder to the Buyer during such month shall bear to the total of such tonnage, said items of cost being as follows, to-wit:

(1) A sum as rental equal to the aggregate of (a) payments to be made by the Seller as rental for the coal properties covered by this agreement which the Seller holds by lease, whether the same be payable as interest upon stated values, with provision for depreciation, or be based on fixed rentals, valuations, tonnages or profits, and with or without provision for depreciation, or whether the same be payable as interest upon bonds, the payment of which interest the Seller has assumed, and with or without provision for depreciation in the value of the properties in question, in all respects as may be provided for in each of said leases; also (b) a sum equal to six (6) per cent per annum upon the value at the time of the making of this agreement of those of said coal properties which are owned by the Seller; also (c) a sum equal to six (6) per cent. per annum upon the value at the time of the making of this agreement of the plant or investment of the Seller at each of said mines in case such plant or investment is not included as a portion of the property upon which interest as aforesaid is to be paid, and also (d) upon all necessary and proper additions to or betterments of said plants, as well as the erection of new plants upon any of said properties. The said coal properties owned by the Seller in said districts and their respective values at the making of this agreement, and the said coal properties held by the Seller under lease, and their respective values at the making of this agreement are described in the schedule hereto attached, marked 'Exhibit A,' and made a part hereof."

Then follow 16 other paragraphs of the contract providing how the cost of the coal is to be arrived at. Among the items entering into the cost to be paid by the Buyer (defendant), and mentioned in the sixth of these paragraphs, are:

"(6) Taxes and special assessments, either municipal, state or governmental charges and imposts of all kinds levied or imposed upon said properties, profits, mines, or their product. No charge on account of special assessments shall be included for more than the portion due for each year for which the charge is made, and no charge whatever shall be included on account of income taxes, or other corporate or franchise taxes due from the Seller."

Plaintiff's position is that it was required to pay to the United States Government profits taxes on the 10 per cent. net profit mentioned in Section 4 above quoted; that the 10 per cent. profit was received by it from the sale and delivery of the coal, and under the contract this tax was a part of the cost price of the coal; that the contract is ambiguous in that it is not clear to what the words "said ** profits," mentioned in paragraph 6 above quoted, refer, and that the evidence which it offered on the trial to explain this ambiguity tended to make clear the meaning of those words. On the other hand, the position of the defendant was and is that the contract is clear and unambiguous and that by its terms the defendant was not required to pay as a part of the cost of the coal the profits tax; further, that the profits tax is but an income tax, and that by the last clause of paragraph 6 above quoted, it is expressly provided that income taxes shall not be included as a part of the cost of the coal. The argument further is that the words "said *** profits" mentioned in paragraph 6 refer to the word "profits" in paragraph 1 and also to the words "net profit" in the first part of Section 4. In support of this latter contention, counsel for defendant in their briefs say: "In appellant's (plaintiff's) brief it is said there is an ambiguity in the contract because it is uncertain whether 'said ***profits' refers to the 10 per cent. net profit or to the profit referred to in para-

graph (1) of section 4, and used as a rental basis. But if such is the case, extrinsic evidence is not admissible to show that an entirely different profit was intended. If there is uncertainty as to which of the two profits is intended, and oral evidence is admissible at all, it will be to show which of the two profits the parties had in mind and not to show some entirely different profit. The language is not, however, ambiguous as to which of the two profits is intended. The language clearly includes both, and if a tax had been levied on either or both of such profits, the appropriate amount of such tax or taxes would have been properly added as a part of the cost of the coal."

We think the argument that the words "said *** profits" refer back to the 10 per cent "net profit" and to the "profits" mentioned in paragraph 1 of section 4 is unsound as to the latter. The "profits" mentioned in paragraph 1 refers to rentals paid out by the Peabody Coal Company, and can in no sense be considered as profits derived by it upon which it must pay taxes. The Federal income tax and the Federal profits tax are both based upon net profits received by the person who pays tax or taxes, and obviously the Peabody Company in the instant case would not be required to pay taxes on what it had paid out for rental of coal lands. It is clear, therefore, that the words "said***profits" can in no way be said to refer to the "profits" mentioned in paragraph 1; and while the words "said***profits" may be said to refer to the 10 per cent. net profit mentioned in section 4, we think this is not entirely free from ambiguity, especially in view of the argument advanced on behalf of the defendant. That argument is to the effect that since the income tax and the profits tax are both income taxes, and the court so held, and that since it is provided in the last clause of paragraph 6 above quoted that income taxes should not be considered as part of the cost of the coal, no recovery could be had

... of section 2, and need on a mental basis. But it seems to me
the more, certainly evidence is not admissible in this case on the
basis of the evidence. It seems to me that the evidence is not
admissible at all. It will be in some cases of the evidence and
evidence has in mind and in some cases entirely different evidence.
The language is not, however, sufficient to be taken as the law
evidence is intended. The language clearly indicates that, and it is
not been taken as either or both of them. The evidence
evidence amount of each tax or some would have been properly taken
as a part of the cost of the work.

We think the argument that the words "and some evidence"
refer back to the 10 per cent "and some" and to the "evidence" men-
tioned in paragraph 1 of section 2 is unavailing as to the latter.
The "evidence" mentioned in paragraph 1 refers to certain facts and
by the Federal Land Company, and can in no sense be considered as
evidence referred to by the words which it must pay taxes. The Federal
Land Company and the Federal Land Company have both been held to be
evidence referred to by the words who pay tax or some, and obviously
the Federal Company is the evidence which must be referred to
pay taxes on what it has sold and the amount of such taxes. It is
clear, however, that the words "and some evidence" can in no way be
said to refer to the "evidence" mentioned in paragraph 1; and while
the words "and some evidence" may be said to refer to the 10 per cent,
not profit mentioned in section 2, we think this is not entirely
true from ambiguity, especially in view of the argument advanced
on behalf of the defendant. That argument is to the effect that
since the Federal Land Company and the Federal Land Company have both
the same as sold, and that since it is provided in the last clause
of paragraph 2 above quoted that Federal Land Company should not be con-
sidered as part of the cost of the work, no recovery could be had

and the judgment of the trial court should be affirmed. If this argument is sound, the first part of paragraph 8 is contradictory of the last clause of that paragraph, because the first part provides that taxes and special assessments, either municipal, state or government, levied or imposed upon "said**profits" are to be included as part of the cost of the coal; and if Federal taxes levied upon profits are to be considered as part of the cost of the coal, this provision would be rendered nugatory because contradicted by the last part of that paragraph if such tax were to be considered an income tax. But if this paragraph is construed to mean that taxes imposed by the Federal government on profits are to be included as part of the cost of the coal as profits tax, and income taxes are not to be included as a part of the cost, then the entire paragraph is rendered harmonious. We think it can scarcely be said that the contract is free from ambiguity; therefore the offered evidence should have been admitted.

While it is true that the Federal excess profits tax and the Federal income tax are both levied upon net income, yet they are two separate, distinct taxes, provided for by two separate and distinct acts of Congress.

The Federal income tax was created by the Act of Congress September 8, 1916 (39 Stat. 756, chap. 463.) Section 10 (1) of that act provides "That there shall be levied, assessed, collected and paid annually upon the total net income received in the preceding calendar year from all sources by every corporation ***** a tax of two percentum upon such income," etc. The excess profits tax was provided for by the act of March 3, 1917. Section 201 of that act provides: "That in addition to the taxes under existing laws there shall be levied, assessed, collected and paid for each taxable year upon the net income of every corporation**** a tax of eight percentum of the amount by which such net income exceeds the sum of (a) \$5,000 and (b) eight percentum of the

actual capital invested."

The defendant further contends that the judgment is right and should be affirmed because it appears that the excess profits tax involved in the instant case was not levied on the 10 percent profit plaintiff received as part of the cost of the coal; that this 10 percent profit was but a part of the plaintiff's income and that the Federal tax is not levied upon a part of the income but upon the whole of it. It is true that under the law the excess profits tax is levied upon the whole of the income, but we are of the opinion that if the evidence offered by plaintiff, and which was excluded, be considered, then it may be said that it was the intention of the parties, as evidenced by the agreement between them, that the defendant was to pay as part of the cost of the coal the amount of profits tax which plaintiff might pay on account of the ten percent profit it received for the coal in question.

We have considered all the other contentions made by the defendant, and are of the opinion that none of them would warrant an affirmance of the judgment.

For the error in excluding the evidence offered by plaintiff, the judgment of the Circuit court of Cook county is reversed and the cause remanded.

REVERSED AND REMANDED.

Matchett, P. J., and McSurely, J., concur.

normal mental processes.

The defendant's testimony that the witness
did not make a statement to him is not true. The witness
did make a statement to him, and he is not denying it.
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Respectfully,
J. J. [Name]

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249 I.A. 638²

F. D. CARPENTER COAL CO.,
a Corporation,
Appellee.

vs.

ALFRED HAMBURGER, INC.,
a Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

F. D. Carpenter Coal Co., a corporation, brought an action against Alfred Hamburger, Inc., a corporation, and Alfred Hamburger, individually, to recover \$731.00, being a balance claimed to be due plaintiff for coal sold and delivered. The case was dismissed as to Alfred Hamburger individually, and a trial resulted in a finding and judgment in plaintiff's favor and against Alfred Hamburger, Inc., a corporation, for \$731, and the defendant appeals.

Counsel for both parties agree that the only point involved in the case is whether the finding of the trial court is against the manifest weight of the evidence. The undisputed evidence is that a representative of plaintiff conferred with a representative of defendant concerning the coal in question. The price, quality and quantity of the coal were all agreed upon and plaintiff was to deliver the coal to a building located at 51st street and Forrestville avenue, Chicago.

Plaintiff's testimony is to the effect that the coal was sold to defendant, while defendant contends that it was merely agent of John J. Johnson, who owned the building to which the coal was to be delivered, and that at the time of the making of the contract between the parties for the purchase and sale of the coal, the defendant's representative stated that the coal was to be paid for out of the rents collected from the Forrestville avenue building. Plaintiff's evidence on this point was that no such agreement was made.

We have carefully examined all the evidence in the record and the argument of counsel, and are clearly of the opinion that we would not be warranted in disturbing the finding of the trial Judge before whom the witnesses appeared and gave their testimony. Under the law we would not be warranted in disturbing the finding and judgment unless we were of the opinion they were against the manifest weight of the evidence. We think the evidence sustains the judgment.

The judgment of the Municipal court of Chicago is affirmed.

AFFIRMED.

Matchett, P. J., and McFarley, J., concur.

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ERNEST GEWALT et al.,
Appellees,

v.

EDWARD D. ROBBEN et al.,
Appellants.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiffs brought an action of assumpsit to recover \$1500 claimed as damages for the breach of a written contract. There was a verdict and judgment in plaintiffs' favor for the amount of their claim and the defendants appeal.

The record discloses that on March 11, 1926, plaintiffs and the defendants entered into a written contract whereby plaintiffs agreed to buy and the defendants to sell a certain piece of real estate described as the south seven feet of lot 31 and all of lot 30 in block 2 in South Chicago Heights subdivision in the southwest quarter of section one, township 37 North, range fifteen, east of the third principal Meridian in Cook county, Illinois. The purchase price mentioned in the contract was \$23,500. At the time of the signing of the contract plaintiffs were given a credit of \$1500 for an equity in a bungalow located in Villa Park, Illinois. They were to assume a first mortgage of \$12,000 and the balance of \$10,000 was to be paid in monthly payments of \$100 a month, beginning on June 11, 1926. Although the written contract does not show that defendants were constructing ^a three flat building known as Nos. 9145 and 9147 Essex avenue, Chicago, yet the evidence shows this to be a fact. The evidence further shows that the building was not

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The record discussed above is dated 11, 1964, and is classified "CONFIDENTIAL".

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The purchase price mentioned in the contract was \$100,000.

They were to receive a third mortgage of \$10,000 and the balance to

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completed by June 1, 1926, the date upon which the evidence tends to show it was to be completed; that about this time the parties met and plaintiffs were informed that the building would not be completed until about October 1 following and this was agreed to by plaintiffs. It was further agreed that the payments mentioned in the contract could not be due and payable on the dates specified in the contract, but that they would be postponed until the building was completed and turned over to plaintiffs. The evidence further tends to show that the building was not completed until shortly after November 1, 1926; that about September 26, 1926, plaintiffs rented one of the apartments and the tenant moved some furniture into the apartment where it remained until about December 2nd following. The evidence further shows that on October 15 plaintiff Ernest Gwalt took certain parties with him as witnesses to one of the defendants and there stated that because the flat building was not completed and he had received no money from his tenant he would not take the property and tendered the written contract at the same time stating that he wanted his Villa Park bungalow back. The defendant refused the tender. The evidence further shows that at the time of the signing of the contract, March 11, plaintiffs were given a credit of \$1500 for a bungalow they were building in Villa Park. There was some evidence that at that time plaintiffs gave the defendants a deed for the Villa Park bungalow, while there is other evidence to the effect that they merely assigned their interest in a contract covering the bungalow. The evidence further shows that the defendants sold the bungalow, but whether this was done before or after October 15, 1926, when plaintiffs wanted to back out, is not clear. There is no evidence as to what plaintiffs received for the bungalow, nor is there any evidence of its value.

completed by June 1, 1936. The date when which the evidence
 leads to show it was to be completed; that about this time the
 parties met and plaintiffs were informed that the building would
 not be completed until about October 1 following this time
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 The evidence further tends to show that the building was not
 completed until shortly after November 1, 1936; that about
 September 26, 1936, plaintiffs tendered one of the payments and
 the money was not received by the defendants until it was
 about two months later, December 1936. The evidence further
 tends to show that plaintiffs were not paid until about
 January 1937 and as a result of this delay plaintiffs and their
 estate had to pay the cost of the building and not completed and as
 a result they received no money from the estate as shown by the property
 and business the estate consisted of the same time as that which
 he wanted his wife to pay plaintiffs money. The evidence further
 tends to show that the evidence further tends to show that at the time of the
 signing of the contract, March 11, 1936, plaintiffs were given a check
 of \$1000 for a mortgage they were holding in Villa Park, Texas.
 The evidence further tends to show that the plaintiffs were the
 deed for the Villa Park mortgage, while there is other evidence
 to the effect that they merely assigned their interest in a
 mortgage covering the building. The evidence further tends to
 the defendant sold the mortgage, but whether this was done before
 or after October 1, 1936, the plaintiffs wanted to know was
 is not clear. There is no evidence as to what plaintiffs received
 for the mortgage, nor is there any evidence as to the value.

In plaintiffs' declaration in a special count they alleged that the property which they were buying from the defendants was "wilfully or mistakenly described," and the evidence shows that while the written contract described the property as being located in section 1 of the subdivision named it was in fact located in section 6 of the subdivision. We think this question is immaterial here. There was no difference of opinion as to the flat building that plaintiffs were buying and the evidence shows that the defendants were able and willing to transfer it to plaintiffs, but that plaintiffs refused to go through with the deal.

A number of points are made by counsel for the defendants in their brief and authorities cited in support of them, but none of these points are argued, - a clear violation of Rule 19 of this court. But we have carefully considered all of the evidence in the record and are clearly of the opinion that the verdict of the jury is against the manifest weight of the evidence. Indeed we think all the evidence shows that plaintiffs did not refuse to take the property because it was not completed, but because they did not want to go through with the deal. Moreover, there is no evidence of the value of the bungalow for which plaintiffs were given a credit of \$1500, and therefore there is no evidence upon which the verdict can be sustained.

The judgment of the Superior court of Cook county is reversed and the cause remanded.

REVERSED AND REMANDED.

Matchett, P. J., and McGuire, J., concur.

32600

FRED A. GARIFFY,
Defendant in Error,

v.

MARIE T. BRAMMER,
Plaintiff in Error.

249 T 4, 638⁴
ERROR TO MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

June 11, 1927, plaintiff brought suit against the defendant claiming there was \$300 due him for legal services rendered. Summons was issued returnable June 23rd at 9:30 in the forenoon. The writ was served on the defendant June 4, 1927, and the defendant was required to appear in room 809 of the city hall on the return date, June 23, 1927. On that date the defendant was defaulted for want of appearance and judgment entered in plaintiff's favor on his affidavit of claim for \$300. July 8 defendant by her counsel filed a written motion, asking that the default and judgment be vacated and that she be given leave to defend. The motion was denied and she prayed an appeal which was allowed upon her filing a bond in the sum of \$500 within thirty days and a bill of exceptions in sixty days. Apparently the appeal was not prosecuted and the defendant sued out a writ of error from this court.

In support of her motion to vacate the default and judgment defendant filed her verified petition in which she swears that on June 23, 1927, she appeared at room 809 in the city hall at 9:45 A. M. and that she remained there until 11:30 A. M., but did not hear her case called; that she then spoke to the clerk of the court who informed her that her

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THE JUDICIAL DEPARTMENT, DEPARTMENT OF THE DISTRICT

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case had been called at 9:50 A. M. and that judgment had been entered against her at that time. She further swears that she believes that she had a good defense to the whole of plaintiff's claim; that her defense was that she had an agreement with plaintiff who was representing her as her attorney to pay him \$50 for the services he rendered her and that she had paid such amount. The motion having been made within thirty days after the judgment had been rendered the court was authorized to vacate and set aside the default and judgment in his sound discretion. While it is true that it appears from plaintiff's verified petition which she filed in support of her motion to vacate the judgment that she was fifteen minutes late in appearing in court, yet the principal point to be considered on such a motion is the merits of the defense. Mandelman v. Clarke, Appellate Court, First District, No. 33049. (Not reported.) In the instant case the defendant swears that she paid plaintiff in full for his services. On a motion of this character this averment must be taken as true, and we are therefore of the opinion that the court should have granted the motion and for failure to do so the order of the Municipal court of Chicago is reversed and the matter remanded for further proceedings in accordance with the views herein expressed.

REVERSED AND REMANDED.

Hatchett, P. J., and McGurely, J., concur.

case had been ruled at \$1000.00 and that judgment had been
entered against her at that time. The further answer that she
believed that she had a good defense to the whole of plaintiff's
claim that her defense was that she had an agreement with
plaintiff who was representing her at her attorney to pay him
\$500 for the services he rendered her and that she had paid such
amount. The answer being that she was - this being the first
time judgment had been rendered the court was authorized to vacate
and set aside the judgment and judgment in his second deposition.
While it is true that it appears from plaintiff's verified
petition which she filed in support of her motion to vacate the
judgment that she was the plaintiff in the case in question in regard
to the principal point to be considered on such a motion in the
case of McDonald v. McDonald, 1904, 100 Cal. 100.
First district, No. 22222. (Not reported.) In the instant
case the defendant avers that she paid plaintiff in full for
his services. On a motion to set aside this judgment must
be taken as true, and as the knowledge of the plaintiff that the
court should have granted the motion and set aside the judgment and the
order of the Municipal court of Chicago is reversed and the
order reversed for further proceedings in accordance with the
above facts appearing.

WITNESSES AND VERIFICATION.

Subscribed, s. s. and sworn to, s. s. sworn.

32708

IRVING GREENWALD,
Appellant,

v.

THE BALTIMORE & OHIO RAILROAD
COMPANY,
Appellee.

249 T.A. 638⁵
a
APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against the defendant to recover damages claimed to have been sustained by him on account of his automobile truck being struck and damaged by one of defendant's trains at a street crossing in Chicago. At the close of the plaintiff's case, on motion of the defendant, there was a directed verdict in its favor. Judgment was entered on the verdict and plaintiff appeals.

The record discloses that about eleven o'clock on the morning of January 15, 1926, plaintiff's truck was being driven north in Manistee avenue, a north and south street in Chicago; that street is crossed by the railroad tracks of the defendant in a northwesterly and southeasterly direction at or near the intersection of 32nd street, an east and west street. As the truck was crossing the third track from the south, it was struck by one of defendant's trains traveling in an northwesterly direction. South of the first or southerly railroad track there is a slight incline in the roadway of Manistee avenue. The truck was being driven about twelve miles an hour until it reached the incline when the driver slowed it down to about four miles an hour and at that time the driver and his helper, who were sitting

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THE STATE OF ILLINOIS
COUNTY OF COOK

IN SENATE
JANUARY 12, 1908

REPORT OF THE COMMISSIONER OF THE LAND OFFICE

Plaintiff brought an action against the defendant to recover damages claimed to have been sustained by him as owner of his automobile which was struck and damaged by the defendant's train at a street crossing in Chicago. In the case of the plaintiff's case, in action of the defendant, there was a dispute as to the facts, judgments were entered on the verdict and plaintiff appealed.

The record reflects that about eleven o'clock on the morning of January 12, 1908, plaintiff's truck and driver were in South street, a north and south street in Chicago, that street is crossed by the railroad tracks of the defendant in a westerly and southeasterly direction at or near the intersection of 32nd street, an east and west street. At the time when plaintiff was driving his truck down the street, it was struck by one of defendant's trains traveling in an easterly direction. South of the time on westerly railroad track there is a slight incline in the roadway at Harrison street. The truck was being driven upon level ground until it reached the incline when the driver allowed it to go down the incline and went on as fast as the driver and his helper, who were sitting

on the front seat of the truck, looked toward the southeast along the railroad track, but their vision was obstructed by some buildings to the southeast so that they could see down the tracks only about 200 feet. The witnesses testified that there was no train in sight at that time. The evidence further showed that they also looked to the southeast when they were near Tasso's house, which was located on the east or to the right of the track and about 60 feet south of the nearest track and saw no train at that time; that just as the truck was crossing the second track they saw a train approaching them from the southeast at a speed of from 35 to 40 miles an hour; that it was then about 75 to 100 feet from the crossing and that the engineer put his head out of the window and blew his whistle once. The driver of the truck attempted to turn off the track but was unable to do so and the engine hit the back of the cab of the truck throwing it off the track and the train ran about 200 feet beyond the crossing before it was stopped. There was further evidence to the effect that it had cost plaintiff \$2200.00 to repair the damaged truck.

If there was any evidence, viewed in the most favorable light to the plaintiff, from which the jury could reasonably find in his favor, then the verdict should not have been directed.

Libby, McNeill & Libby v. Cook, 322 Ill. 206. Plaintiff contends that under the decisions of this court and of the Supreme Court of this state the question of the negligence of the defendant and the question whether the plaintiff was in the exercise of due care, were questions of fact for the jury. In view of the holding of this court in the recent case of Goodman v. Chicago & E. I. Ry. Co., 343 Ill. App. 128, we think that the action of the trial court in directing a verdict must be sustained. In

that case we approved of the holding of the Supreme Court of the United States in Baltimore & O. R. Co. v. Goodman, U. S. 72 L. Ed., 48 Sup. Ct. 24, where it was held in substance that where a person attempts to cross a railroad track in the day time and is struck and injured, no recovery can be had because plaintiff in such case is guilty of negligence as a matter of law. In the instant case plaintiff's truck was being driven across the defendant's railroad tracks in the day time, and he was therefore, under the existing circumstances, guilty of negligence as a matter of law and cannot recover.

The judgment of the Superior Court of Cook County is affirmed.

AFFIRMED.

Matchett, P. J., and McGuire, J., concur.

that was approved by the Board of the
United States in Williams v. United States, 10 U.S. 21.
In 1870, when it was held in substance that there
was a certain amount of money in the Treasury and
in other and other, the property was not income, but
in some cases it might be regarded as income of law, in
the United States. It is not income of law, but
income, a certain amount of money in the Treasury and
other the United States, which is regarded as a part
of law and income property.
The United States is the United States of America.

United States.

United States.

United States, 10 U.S. 21.

IDA G. HOGG, individually
and as administratrix of the
estate of LLOYD W. HOGG,
deceased,

Appellee,

v.

ROBERT ECKHARDT,

Appellant.

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

MR. PRESIDING JUSTICE BARNES

DELIVERED THE OPINION OF THE COURT.

This appeal (case No. 31999) was consolidated for hearing with that from the same decree in case No. 32233, in which we have this day filed an opinion and have considered therein the questions raised and argued in both appeals, and awarded in effect all of the certificates of stock in controversy to complainant, thus reversing the decree so far as it awards part thereof to defendant and provides for a division of costs. Reference to that opinion is hereby made, and for the reasons therein stated, a like order, reversing the decree in part and affirming it in part, and remanding the cause with directions to enter a decree therein in conformity with said opinion, will be entered herein.

REVERSED IN PART AND AFFIRMED IN PART,
AND REMANDED WITH DIRECTIONS.

Gridley and Scanlan, JJ., concur.

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WILSHIRE APARTMENT BUILDING
CORPORATION,

Appellee,

v.

DRANE MOFFAT LINTON,
Appellant.APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On December 9, 1926, a judgment for \$710, by confession on a lease, was entered against defendant. The amount of the judgment is for rent, for an apartment in a building at 8450 Kenwood avenue, Chicago, claimed to be due plaintiff as assignee of the original lessors for the months of May, June, July, August and September, 1926, at \$125 per month (\$625), and includes \$85 for attorney's fees. By the lease, containing the usual covenants and dated July 27, 1925, plaintiff's assignors demised the premises to defendant, as a residence or dwelling, for a period of thirteen months, viz., from September 1, 1925, to and including September 30, 1926, at \$125 per month, payable in advance. On January 5, 1927, on defendant's motion, supported by his affidavit, the court ordered that the judgment be opened, etc., and that said affidavit stand as an affidavit of merits. On March 3, 1927, after a hearing without a jury, at which witnesses for both parties testified, the court found that at the date of the rendition of the confessed judgment there was due to plaintiff from defendant the sum of \$500, and entered judgment for said sum against defendant and he appealed.

Defendant paid the stipulated rent up to and including the month of April, 1926, but did not pay any rent thereafter.

About April 28th he vacated the premises, moving all his furniture and effects therefrom, on account of a change in his business affairs requiring him to go to Dayton, Ohio, and to there reside for a time. About two weeks before he moved out he had a conversation with P. H. Land, manager of the building for plaintiff, and advised the latter of his contemplated change of residence and the reasons therefor. Land replied that he was sorry to lose such a good tenant as defendant had been, and that plaintiff would endeavor, if possible, to either re-rent or sub-let the premises for the remaining term of the lease. Defendant said that he did not think that there would be any trouble in doing so. After he had moved out he gave the keys of the premises to Land who received them. A day or two later, and while defendant temporarily was staying at a Chicago hotel, Land requested that defendant send him the "mail box" keys and defendant did so. Plaintiff endeavored to re-rent or sub-let the premises for remaining portions of the term, inserting advertisements in the newspapers, etc., but was unsuccessful in its efforts. During this time plaintiff mailed monthly bills to defendant at his address at Dayton, Ohio, requesting payment of rent, to which defendant made no reply. Plaintiff succeeded in obtaining a new tenant for the premises, commencing October 1, 1926, allowing said tenant to move in a few days before the end of September. The court took this fact into consideration in making the finding of \$600, and in not allowing plaintiff any attorney's fees as included in the judgment as originally confessed.

Defendant's counsel contends in substance that the finding and judgment are erroneous because plaintiff voluntarily accepted defendant's surrender of the premises in April, 1926, thereby releasing defendant of any liability for rent for the balance of the term. We cannot agree with the contention, and all of the

[illegible]

opinion that the finding and judgment are fully warranted by the evidence and the law. Defendant abandoned the premises before the end of the term, for the reasons shown and without fault on plaintiff's part, and, having vacated, it was his duty to deliver all keys to plaintiff. The latter's mere acceptance of the keys did not release defendant from his liability to pay rent according to the terms of the lease. (Robinson v. Menaghan, 92 Ill. App. 620, 623; Scanlan v. Heerth, 151 Ill. App. 532, 536); nor did its re-entry and attempts to re-rent or sub-let the premises for defendant's benefit do so. (Mumiston, Keeling & Co. v. Wheeler, 175 Ill. 514, 516; West Side Auction Co. v. Connecticut, etc. Ins. Co., 186 Ill. 156, 161.)

The judgment appealed from should be affirmed and it is so ordered.

AFFIRMED.

Barnes, P. J., and Scanlan, J., concur.

EMIL H. CHRISTIANSEN,
Appellee.

v.

A. L. BENTLEY & SON,
a corporation.
Appellant.

APPEAL FROM CIRCUIT
COURT, COCK COUNTY.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from a decree of the circuit court, entered March 23, 1927, wherein the court, after making numerous findings and sustaining certain exceptions of each party to the master's report and overruling others, ordered that defendant account to complainant for the total business done by it for the calendar years 1922 and 1923 and for that portion of the year 1924 up to August 13th; that for the purpose of such accounting the cause be re-referred to the master with directions that he take the account and hear evidence and report the same to the court, together with his conclusions and recommendations; that both parties, when directed by the master, appear before him with their books and records and be examined respecting the account; that in stating the account the master shall allow, as deductions from the gross business of defendant for said respective years, only the net cost of livery and merchandise, as shown by defendant's books or other competent evidence, giving to complainant credit for all discounts and cash rebates received either by defendant or its president; and that the master hear testimony as to the amount of damages suffered by complainant because of his discharge from defendant's employ on August 13, 1924, prior

to the expiration of the calendar year of 1924, and report to the court his findings as to the amount of the damages. In the decree the court reserved jurisdiction of the cause for the purpose of enforcing payment of any amounts found to be due to complainant, and of entering judgment for such damages for breach of contract as may be found due to complainant, and of taxing costs, etc. Certain cross-errors have here been assigned by complainant.

The original bill was filed in September, 1924, and on May 26, 1925, complainant's second amended bill was filed in which he alleged in substance that defendant was, and had been for many years, engaged in the undertaking business in Chicago; that for several years prior to January 1, 1923, complainant had worked for defendant on a salary; that on or about that date he entered into a new agreement with it whereby he was employed for the calendar year of 1923 as salesman, funeral director and manager of defendant's business at a salary of \$3,000 a year, and was to receive in addition two per cent (2%) of the amount of the gross business done by defendant during that year, less sums expended for livery hire and "coaskets" - said amount to be computed and paid at the end of the year as per a statement of account to be rendered by defendant; that the arrangement as to salary was verbal, but that, as to said two per cent commission, a written memorandum was executed, which defendant took possession of, but no copy was retained by complainant; that complainant worked in said capacities during said year and received the salary; that about January 4, 1923, Leon A. Bentley, president of defendant, paid to him the sum of \$1457.73, and represented at the time that said sum was the amount due to him under said written memorandum; that neither at

the time of the payment nor thereafter did defendant render any statement of account; that Bentley, in complainant's presence, crossed out the word "caskets" in the written memorandum and wrote the word "merchandise" in its place; that defendant did not then give to complainant, nor has it since given in response to his demands therefor, any statement of account showing defendant's gross business for the year, which exceeded \$135,000, while the total expense for livery hire and for caskets did not equal \$30,000; and that on a just and true account for the year it will be shown that defendant is indebted to complainant in the additional sum of about \$1,000.

Complainant further alleged in substance that about January 1, 1923, he entered into another agreement with defendant as to his employment for the calendar year 1923, which was similar to that of the preceding year as to salary, but in which the additional payment to be made was three per cent (3%) on defendant's gross business, less livery hire and "merchandise," of which one per cent (1%) was to be paid in consideration of complainant's services as manager; that he performed his part of the agreement and received the salary; that about January 4, 1924, defendant paid him the sum of \$1613.06, on account of said commission, but did not then or thereafter render to complainant any statement of account, although demands were made therefor; that defendant's gross business for the year 1923, exceeded \$150,000, while the total expense for livery hire and merchandise did not equal \$40,000; and that on an accounting for the year 1923 it will be shown that defendant is indebted to complainant in an additional sum of not less than \$2,000.

Complainant further alleged in substance that about January 3, 1924, he entered into another agreement with defendant for the calendar year 1924, which was substantially the same as

the time of the payment was transferred to his personal account and
 statement of account; that further, in connection with the payment,
 receipt was the only "receipt" as the receipt was not given and was
 the word "receipt" as the receipt was not given and was
 given to receipt, but was not given as receipt to his
 personal account, any statement of account showing the receipt
 given business for the year, which business was \$100,000, while the
 total expense for living was for each day was about \$10,000, and
 that on a last day of the year, the year is still the same
 that business is included in the statement in the statement and
 at about \$1,000.
 Complaint further alleged in substance that about
 January 1, 1931, he received from the business about \$10,000
 as he had received for the business year 1930, which was about
 in fact of the business year as he stated, but in fact he
 additional payment in the year was about \$10,000 as the business
 given business, but living was not "receipted", at which was
 for each day was in the year in connection with the business
 business as business was in business his part of the business
 and received the money; that about January 1, 1931, business was
 the year of 1930, on account of said business, but the year
 that he received money in connection with business of account,
 although business was not shown; that business was given business
 for the year 1931, which business was \$100,000, while the total business was
 living was not receipted as the receipt was not given and was
 accounting for the year 1931 as all the other business in
 included in the statement in the statement and was about \$10,000.
 Complaint further alleged in substance that about
 January 1, 1931, he received from the business about \$10,000
 for the business year 1930, which was substantially the same as

the one for 1923, except that said commission was two per cent (2%); that he performed his part of the agreement and received the salary up to August 18, 1924, when he was discharged, arbitrarily and without cause; that no payments for any commissions for said portion of 1924 were made or any statement of account rendered to him; that on the commission account for said period defendant is indebted to him in a sum of not less than \$1500; and that he has suffered damage by reason of not being able to obtain other employment for the balance of the year. He prayed that defendant be required to produce its books, records, etc., and that an accounting be had under the court's direction, etc. There were contained in the prayer 15 special interrogatories to be answered by defendant.

Defendant filed an answer to the bill, to which complainant filed exceptions, claiming that the answer was evasive and insufficient. Some of these exceptions were sustained and defendant was ordered to answer certain interrogatories, some of which it did answer, and on July 8, 1925, the cause was referred to a master to take evidence and report his conclusions on certain issues of fact, specifically mentioned in the order.

Much testimony was taken before the master, and on December 21, 1926, he filed his report. Objections to the report made by each party were ordered to stand as exceptions, and after a hearing upon them the court entered the decree appealed from.

We have considered the four points made by defendant's counsel as grounds for a reversal of the decree, and are of the opinion that all are without merit. We think that the court was warranted by the evidence in finding that complainant,

without good cause and against his will, was discharged from his position with defendant on August 13, 1924, and that he had not waived his right to an accounting by reason of his acceptance of certain sums on account of commissions in January in the years 1923 and 1924. And we think that complainant is entitled to such an accounting as is decreed by the court as first above mentioned. And we do not think that there is any substantial merit in the cross errors as assigned by complainant.

The decree appealed from should be affirmed and it is so ordered. The filing by appellee (complainant) of the so-called additional abstract was unnecessary and the cost thereof will not be taxed against appellant (defendant).

AFFIRMED.

Barnes, P. J., and Scanlan, J., concur.

the following: "The first of these is the fact that the
 results of the investigation of the first of these
 subjects are in the nature of a preliminary study of the
 subject and are not intended to be a final statement on the
 subject. The second of these is the fact that the results
 of the investigation of the second of these subjects are
 in the nature of a preliminary study of the subject and
 are not intended to be a final statement on the subject.
 The third of these is the fact that the results of the
 investigation of the third of these subjects are in the
 nature of a preliminary study of the subject and are not
 intended to be a final statement on the subject."

The results of the investigation of the first of these
 subjects are in the nature of a preliminary study of the
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 these subjects are in the nature of a preliminary study of
 the subject and are not intended to be a final statement
 on the subject. The results of the investigation of the
 third of these subjects are in the nature of a preliminary
 study of the subject and are not intended to be a final
 statement on the subject.

THE END

RECEIVED BY THE U.S. DEPARTMENT OF JUSTICE

393 - 32334

249 I.A. 639⁴

BELLA SCHIFF,
Appellee,

vs.

ABE KESSLER and JENNIE
KESLER,
Appellants.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In a fourth class action in contract there was a trial without a jury in May, 1927, resulting in the court finding the issues on plaintiff's statement of claim and defendants' set-off against defendants and assessing plaintiff's damages at \$327.60. Judgment was entered on the finding against defendants on May 23, 1927, and they have appealed.

In plaintiff's amended statement of claim, filed March 12, 1927, she alleged in substance that in September, 1924, she owned and possessed a certain third mortgage incumbrance on certain real estate in Chicago; that thereafter by agreement with defendants they became the trustees for plaintiff of said incumbrance for the purpose of selling the same for not less than \$2,900; that under the agreement defendants, when such sale should be made, were to retain the money received as a loan to them from plaintiff, to be repaid to her upon demand; that thereafter defendants sold the incumbrance, retained the moneys received therefor, and became indebted to plaintiff in the sum of \$2900; that at various times thereafter they repaid to plaintiff on account of said loan certain sums, aggregating \$1925, leaving a balance due of \$975, which, notwithstanding frequent demands, they have failed and refused to pay to plaintiff.

In defendants' affidavit of merits, filed March 23, 1927, and made by Abe Kessler for himself and for Jennie Kessler

as her duly authorized agent, they denied that they made the agreement as stated by plaintiff. They alleged in substance that when plaintiff transferred said incumbrance it was understood that the same should be sold for \$2,550; that thereafter the same was sold for that amount; and that from time to time thereafter Abe Kessler paid to plaintiff or on her order, on account of the proceeds of the sale of the incumbrance, the aggregate sum of \$1842.40, and not \$1928 as alleged by plaintiff, leaving a balance due plaintiff of \$707.60. And defendants further alleged in substance that, as against said balance, plaintiff owed them the sum of \$797.80, as rent for certain premises owned by defendants at an agreed rental of \$75.50 per month; that in April, 1926, plaintiff proposed that the rental for the premises should be applied on the balance due to her from defendants on account of the proceeds of the sale of said incumbrance, to which defendants consented; that plaintiff occupied the premises for 11 months until and including February, 1927, and did not pay to defendants any sums as rent during the period; and that plaintiff is indebted to defendants in the net sum of \$89.90.

Defendants also filed a statement of claim of set-off against plaintiff in said sum of \$89.90, to which plaintiff filed an affidavit of merits, which on defendants' motion was stricken. Thereafter she filed an amended affidavit of merits to the claim of set-off.

On April 19, 1927, on defendants' motion, plaintiff was ordered to reply to defendants' affidavit of merits to her amended statement of claim. In this reply she denied that defendants, on account of the mortgage incumbrance, had paid to her the total sum of \$1842.40, and alleged that they only had paid a total of \$1200. She admitted her occupancy of defendants' premises for

[illegible]

a period of 10 months, from May, 1926, to February, 1927, inclusive, at an agreed rental of \$72.50 per month, and alleged that the sum of \$725, due from her as rent, had been credited to defendants, and was a part of the total credit of \$1925, as mentioned in her amended statement of claim.

On the trial plaintiff was a witness in her own behalf and two witnesses testified for her. Both of the defendants testified and two witnesses for them. Some documentary evidence was introduced. The hearing amounted to an accounting between the parties as to their several claims. We have reviewed the evidence as contained in the abstract and are unable to say that the court's finding is against the manifest weight of the evidence, as urged by defendants' counsel.

It is also contended that the judgment is erroneous because Jennie Kessler is not jointly liable with Abe Kessler, her husband. This defense was not set forth in defendants' affidavit of merits, nor was it specifically raised upon the trial. Furthermore, in our opinion, the evidence sufficiently disclosed that they were jointly liable for the indebtedness sued for.

And we do not think that there is any substantial merit in counsel's further contentions (1) that the action as against Jennie Kessler was premature because of lack of proof of a formal demand upon her to pay the claimed indebtedness, (2) that the court improperly excluded certain evidence offered by defendants, and (3) that the court exhibited upon the trial an undue partiality towards plaintiff.

Finding no reversible error in the record the judgment is affirmed.

AFFIRMED.

Barnes, P. J., and Scanlan, J., concur.

a total of 25 minutes, from 10:15 AM to 10:40 AM, on the 10th of June, 1968, at an agreed period of 10:15 AM on the 10th of June, 1968, and at 10:15 AM, the time set as true, and from 10:15 AM to 10:40 AM, was a part of the total amount of 10:15 AM, as mentioned in the preceding statement of witness.

On the 10th of June, 1968, a witness is now on duty and two witnesses testified to that. Both of the witnesses testified that two witnesses testified to that. Two witnesses testified to that. The hearing amounted to an accounting between the parties to their several claims. We have reviewed the evidence as contained in the abstract and are unable to say that the parties' testimony is against the weight of the evidence, as urged by defendant's counsel.

It is also understood that the 10th of June, 1968, because James Baxter is not jointly liable with defendant, but defendant. This defense was not set forth in defendant's affidavit of merits, nor was it specifically stated upon the 10th of June, 1968, in the opinion, nor was it specifically stated that they were jointly liable for the defendant's claim.

And we do not think that there is any substantial merit in defendant's further contention (2) that the action is against James Baxter and defendant because of lack of proof of a formal demand upon him to pay the claimed indebtedness, (3) that the court improperly admitted certain evidence offered by defendant, and (4) that the court admitted upon the 10th of June, 1968, relevant testimony.

Nothing on defendant's motion is now before the court as admitted.

J. A. GETTINGER,
Appellee,

v.

BERT L. WHITE COMPANY,
a corporation,
Appellant.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

MR. JUSTICE BRIDLEY DELIVERED THE OPINION OF THE COURT.

On October 29, 1923, plaintiff, who had been a solicitor or salesman for defendant engaged in the advertising business in Chicago, commenced an action in assumpsit against it to recover moneys claimed to be due to him under a verbal contract for commissions, bonus or additional compensation, as variously designated by the witnesses, for the year 1920 and a portion of the year 1921. The cause was tried before a jury in April, 1927, resulting in a verdict and judgment in his favor for \$2820⁰⁰, and defendant appealed.

Plaintiff alone testified in his behalf. For defendant four witnesses testified, - its president and general manager, Bert L. White, two employees of defendant and who were such during the years 1920 and 1921, and a former solicitor or salesman of defendant during said years. Defendant also introduced certain documentary evidence.

The material facts are in substance as follows: About June, 1917, plaintiff entered defendant's employ as a solicitor or salesman and continued as such until during the month of September, 1921, when he voluntarily and suddenly resigned his position. His salary at first was \$40 a week. Later it was raised to \$65, and it continued in that amount until the end of the year 1919. In

December, 1919, he demanded of White that his salary be raised, commencing January 1, 1920, and that he also be allowed a commission on his sales. As a result of this demand a verbal agreement was made between him and White, acting for defendant, that, for the year, 1920, he was to receive a salary or drawing account of \$75 a week; that commissions of seven and one-half per cent on all his sales during the year, less certain agreed deductions, were to be figured and allowed to him; and that if said commissions, less the deductions, exceeded said salary for the year, as drawn each week, he was to receive the excess at the end of the year as additional compensation or as a bonus. White testified that this agreement or arrangement was conditional (1) upon defendant's entire business being operated at a profit for the calendar year and (2) upon plaintiff remaining in defendant's employ for the entire year. Plaintiff's testimony was to the effect that no such conditions were agreed upon. This conflict in the testimony is, however, of no importance in so far as the year 1920 is concerned, because defendant's entire business during that year was operated at a profit and plaintiff remained as an employee of defendant during all of the year. In July, 1920, plaintiff borrowed \$300 from defendant and, to evidence the debt, executed and delivered to it his note in that amount. During January, 1921, a dispute arose between plaintiff and White as to the amount of additional compensation that plaintiff was entitled to receive for his services for the year 1920 under said verbal agreement. This dispute was settled by White agreeing to allow plaintiff \$1000, and plaintiff consenting thereto. On January 21, 1921, plaintiff's note of \$300 was cancelled and destroyed and defendant gave to plaintiff its check for \$700. On the back of

the check, when it was delivered to and accepted by plaintiff, was the endorsement: "This check is rendered in full settlement of account as listed below: Additional Comp. for year 1920; net amount \$700." Plaintiff endorsed the check and received in money the amount thereof.

After considering the evidence and the briefs of counsel we have reached the conclusion that the verdict and judgment are contrary to the law and the evidence and that the judgment should be reversed and the cause remanded.

Upon the trial plaintiff claimed a considerable sum due him for commissions or additional compensation for the year 1920, over and above the \$1000 which was paid him as shown, and also a considerable sum for commissions, etc., for that portion of the year, 1921, that he remained in defendant's employ. It is apparent from the evidence and the amount of the verdict that the jury allowed him considerable sums for commissions, etc., for both years, 1920 and 1921. It is clear to us that no commissions, etc. should have been allowed to him for the year 1920, because of the settlement made as shown. It is the law that the acceptance and cashing of a check, containing a notation that it is in full settlement of an account (the amount of which is in dispute), constitutes an accord and satisfaction. (Jenai v. Larny, 237 Ill. 359, 366; Know v. Griesheimer, 220 Ill. 108, 110; Ostrander v. Scott, 161 Ill. 339, 345.)

Defendant's counsel contend that, because it appears from the evidence that defendant's business was run at a loss during the year, 1921, and that plaintiff did not remain in defendant's employ during that entire year, no commissions, etc. are due to plaintiff. A sufficient answer to this contention is,

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1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the People of the South (CLPS) in the United States.

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633-332

***** IT contains a large number of errors *****

Figure 7. The effect of the initial concentration of the monomer on the polymerization of 2-methyl-2-butene initiated by TiCl_4 in CH_2Cl_2 at -78°C for 10 min. [monomer] = 0.05 M, [monomer] = 0.1 M, [monomer] = 0.2 M, [monomer] = 0.3 M, [monomer] = 0.4 M, [monomer] = 0.5 M, [monomer] = 0.6 M, [monomer] = 0.7 M, [monomer] = 0.8 M, [monomer] = 0.9 M, [monomer] = 1.0 M.

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we think, that the evidence is conflicting as to what the agreement or arrangement made in December, 1919, was in some of its particulars. Whatever the agreement was, both parties seem to have treated it as continuing during the year 1921, and we think it is for the jury to say, under proper instructions, what, if anything, may be due to plaintiff under said agreement or arrangement for the portion of the year, 1921, prior to September, 1921, when plaintiff voluntarily left defendant's employ.

For the reasons indicated the judgment of the Superior court is reversed and the cause remanded.

REVERSED AND REMANDED.

Barnes, P. J., and Scanlan, J., concur.

428 - 32369

GEORGE F. MILLER,
Appellant,

v.

HERBERT D. PETERSON and
C. M. VARDI,
Appellees.

APPEAL FROM CIRCUIT COURT.

COOK COUNTY.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In an action for damages for an assault and battery upon plaintiff, a jury at the first trial in January, 1927, returned a verdict finding the defendant, Peterson, not guilty, but finding the defendant, Vardi, guilty and assessing plaintiff's damages at eight cents. Plaintiff's motion for a new trial was allowed. On the second trial before the same judge in May, 1927, another jury returned a verdict finding both defendants guilty and assessing plaintiff's damages at one dollar. Judgment was entered upon the verdict and plaintiff appealed.

On the morning of July 7, 1928, the defendant, Vardi, was attempting to move his automobile westerly on a private and narrow driveway between two residences on the east side of Sheridan road, Evanston, in order to reach said road, and then proceed to Chicago. Peterson had just become a passenger in the car. As they started plaintiff, chauffeur for the owner of one of the residences, drove another automobile from the road partially into the driveway, blocking defendants' exit therefrom. After he had refused to move his car both defendants left their car and went to where plaintiff was standing, near his car. After heated words were passed plaintiff struck Vardi and a lively fist fight between the two ensued, in which plaintiff received the most punishment. He was injured

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In an action for damages for an assault and battery upon plaintiff, a jury at the trial in January, 1937, returned a verdict finding the defendant, defendant, and plaintiff, finding the defendant, plaintiff, and defendant, plaintiff's damages at eight hundred. Plaintiff's motion for a new trial was allowed. On the second trial before the same jury in May, 1937, another jury returned a verdict finding defendant guilty and assessing plaintiff's damages at one hundred. Plaintiff was ordered upon the verdict and plaintiff appealed. On the morning of July 1, 1937, the defendant, plaintiff, was attempting to move his automobile westward on a private road between driveway between two residences on the west side of Madison Street, defendant, in order to reach said road, and then proceed to Chicago. Defendant had just passed a newspaper in the car, as they started plaintiff, defendant for the court at one of the residences. Grove another automobile from the road plaintiff into the driveway. Plaintiff defendant, only defendant. After he had returned to move his car back defendant left him car and went to where plaintiff was standing, near his car. After moving back toward plaintiff left again toward a driver who had been between the two houses, in which plaintiff received the most punishment. He was injured

in the mouth, eyes and ears by blows struck by Vardi and subsequently was treated by a physician. Peterson made endeavors during the fight to separate the combatants.

Plaintiff's counsel contends that under the evidence plaintiff is entitled to substantial damages, that the amount of damages awarded by the jury is so insufficient as to be absurd, and that, hence, the judgment should be reversed and a new trial had. After a careful review of the evidence, conflicting as it is in some details, we are not disposed to disturb the jury's verdict or the judgment. Plaintiff's action in refusing to allow defendants' exit from the driveway was inexcusable. And it appears from the clear weight of the evidence that afterwards he was determined to have a physical encounter with Vardi, that he struck the first blow, and that the injuries he received were largely the result of his own unwarranted conduct.

The judgment appealed from should be affirmed and it is so ordered.

AFFIRMED.

Barnes, P. J., and Seanlan, J., concur.

in the month of June and July of 1934 and 1935.
 exactly was treated by a physician. Between 1934 and 1935
 during the time he occupied the position.

Thereafter, several months later, the witness
 testified in relation to substantial damages, that the amount
 of damages awarded by the jury is no indication as to the
 ability, and that, however, the judgment should be rendered and a
 new trial had. Then a certain number of the evidence, con-
 sidering as it is in some details, he was not disposed to discuss
 the jury's verdict on the judgment. Thereafter, he was in-
 formed in 1934 (approximately) that the witness was in-
 substance, and it appears from the facts of the witness
 that afterwards he was determined to have a physical examination
 with Verdi, and he received the first blow, and that the witness
 he received some injury, the result of his own conduct.

CONCLUSION.

The witness requested from should be returned and

it is as stated.

WITNESSES,

Witness, J. A. and W. C. L. J. J.

MATTESSON-FOGARTY-JORDAN CO.,
a corporation,

Appellee,

v.

G. M. ATWELL,

Appellant.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE GRIMLEY DELIVERED THE OPINION OF THE COURT.

In an action in assumpsit upon defendant's note for \$2,192.45, dated February 16, 1920, payable to plaintiff's order on or before one year after date with 5 per cent interest, and upon a certain agreement duly executed by both parties, on the same day, there was a trial before the court without a jury in May, 1927, resulting in a finding and judgment against defendant for \$2985.81, being the amount of the note and interest. Defendant appealed.

Plaintiff's declaration, filed May 24, 1921, consisted of three special counts and the common counts. The first special count declared upon the note in the usual form. The second set forth in hæc verba both the note and the agreement, and charged that defendant was liable to plaintiff for the amount of the note and interest, no part of which had been paid. The third declared upon an account stated.

The agreement referred to, after setting forth that a certain corporation, in which said Atwell (defendant) has an interest, was indebted to the Matteson, etc. Co. (plaintiff) in the sum of \$2192.45, and that Atwell had theretofore personally guaranteed said indebtedness and is now personally liable to said Matteson Co. for the same, provides:

"That said Atwell, in consideration of the forbearance from bringing suit on said debt for the period of one year from the date hereof, will pay to said Matteson Co. (plaintiff) his said indebtedness of \$2192.45, within one year from the date hereof, with interest at the rate of 5 per cent per annum; that he will pay to or allow said Matteson Co. to demand, collect, retain, hold or receive fifty (50) per cent of the contract price, or of any charge made or bill rendered by said Atwell, for any printing, binding or other work which the said Matteson Co. may, on or after the date hereof, contract for in its own behalf for its own use, or as agent for any person, firm or corporation, or, on any contract made directly between said Atwell and any other person, firm or corporation, if the said contract was procured and entered into by and through the efforts and solicitation of said Matteson Co., the said fifty (50) per cent to be deducted, held, retained, collected and received, and shall be applied to said indebtedness, until the same with interest has been fully paid and discharged, but if the sum or sums thus applied do not pay in full the said debt and interest thereon at the expiration of said one year, it is agreed by said Atwell that he will pay such amount as then remains due and payable.

That nothing herein contained shall be construed in such manner as to require or make it incumbent upon said Matteson Co. to procure or give to said Atwell any contract, contracts or orders for printing, binding or other work, - the intention of the parties being that it is optional with said Matteson Co. to give or refuse to give or turn over to said Atwell any such contract, contracts or orders for printing, binding or other work.

That nothing herein contained, or the execution of this agreement, shall operate or be construed as a release or waiver of the liability or discharge of any other person or persons personally liable with said Atwell from the debt herein mentioned.

Said indebtedness of \$2192.45 is further evidenced by the promissory note of said Atwell, dated February 10, 1920, payable on or before one year after date, to the order of said Matteson Co. and bears interest at 5 per cent per annum."

To the declaration Atwell (defendant) filed a plea of the general issue and gave notice of a claim of set-off. Subsequently, on December 10, 1923, by leave of court, he filed a plea of set-off in which he alleged that plaintiff at the time of the commencement of the suit was, and still is, indebted to him in the sum of \$2500 "for printed matter made up and delivered by the Atwell Printing and Binding Co., a corporation, to the International Mill and Timber Co., a corporation, (hereinafter referred to as the International Co.), for the account of plaintiff and at its request, which said sum

plaintiff assumed and agreed to pay to said Atwell Co.;" that thereafter, on June 1, 1920, the Atwell Co., for value received, assigned its said claim for said merchandise to the defendant personally (copy of assignment of the claim for \$2,037.30 set forth); that since said date defendant has been the bona fide owner of the claim; and that plaintiff is indebted to him therefor, which indebtedness defendant presents as a set-off against plaintiff's claim as sued upon, etc.

To this claim of set-off plaintiff filed a plea of the general issue, and also a plea of the statute of frauds.

On the trial the evidence disclosed that the Matteson Co. (plaintiff) was conducting the business of an advertising agency for various clients, one of which was the International Co. Warren E. Faxon was an employee of plaintiff - a "contact" man, as he testified. In March, 1920, the International Co. informed plaintiff that it desired the latter to procure for it in the market certain circulars and other advertising literature for use in its business. Faxon went to the office of the Atwell Co., saw defendant, its president, informed him that the International Co. was in the market for said circulars and literature and asked him if the Atwell Co. desired to figure on the job. Defendant replied that it did and that it would furnish the quotations direct to the International Co. Faxon at the time further said to defendant in substance that the Matteson Co. would not assume any financial responsibility for the work, if done by the Atwell Co., but that it would have to look to the International Co. for its pay. Faxon further said that as soon as the Matteson Co., as agent for the International Co., received the latter's written orders for the work, it would forward them to the Atwell Co. Subsequently the Atwell Co. rendered quotations to the International

Co., which were satisfactory to the latter, and, under date of March 13, 1920, the latter forwarded two written orders to the Matteson Co., which in turn forwarded the same to the Atwell Co. These orders, containing specifications, prices, terms, and directions as to shipment, were addressed to the Atwell Co. One was for "100 M. Testimonial Circulars" and the other for "25 M. Industrial Flyers." Both orders were filled and the goods finally delivered to the International Co. during April, 1920. The latter company did not pay for any part of the goods. It was taken over by a creditors' committee in December, 1920, and in 1921 it was adjudicated a bankrupt.

The main contention of defendant's counsel is, in substance, that the court erred in not allowing defendant's set-off to the amount due upon his note. We cannot agree with the contention. It is clear from the evidence that plaintiff, in its negotiations with the Atwell Co. leading up to the furnishing by the Atwell Co. of the goods to the International Co., acted solely as an agent for the International Co., and that the Atwell Co., and Atwell personally, knew at all times that it (plaintiff) was acting solely as such agent and not as a principal. "Where an agent discloses the fact of his agency, or where the other party knows at the time that he is acting as such agent, the latter will not be liable, unless he binds himself to become responsible." (St. Louis R. Co. v. White Lumber Co., 169 Ill. App. 482, 483; Stone v. Kreis, 202 Ill. App. 43, 45; Durham v. Stubbings, 111 Ill. App. 10, 12; Millikin v. Jones, 77 Ill. 372, 375.) And we find nothing in the agreement of February 16, 1920, between plaintiff and Atwell, that would render plaintiff liable to the Atwell Co., or to Atwell as its assignee, for such a transaction as is shown to have been consummated between the Atwell Co., and the International Co.

And we do not think the court erred in refusing to admit certain evidence as to the status of the books of the International Co., at the time of and after said transaction, as urged by counsel.

The judgment of the Circuit court should be affirmed and it is so ordered.

AFFIRMED.

Barnes, P. J., and Scanlan, J., concur.

1. The Commission has received information that the following persons have been identified as having been involved in the activities of the Communist Party, U.S.A., in the United States:

— *Journal of the American Medical Association*, 1997; 278: 223

249 I.A. 640⁴

58 - 31994

WILLIAM B. CLARK,
Plaintiff in Error,

v.

MATTIE THOMPSON and
MRS. E. A. HARRIS,
Defendants in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

In the Municipal Court of Chicago, a judgment by confession on a promissory note was entered March 9, 1926, in favor of the plaintiff, William B. Clark, and against the defendants, Mattie Thompson and Mrs. E. A. Harris, for \$251. On March 19, 1926, the defendants moved the court to vacate the judgment and for leave to plead. The motion was supported by an affidavit of the defendant Thompson setting up that "she has a good defense to the whole of plaintiff's statement of claim. That her defense is as follows: That the note upon which judgment was obtained * * * was signed by her in the sum of \$240.00 and that the defendant Mrs. E. A. Harris signed said note with her as an accommodation maker; that the said note was given for a loan made by the plaintiff to the affiant in the sum of \$200 for thirty days, but that plaintiff * * * added to the amount of said note a charge of \$40.00, which said charge of \$40.00 was usurious and void. * * * Affiant further states that by virtue of a statute of the State of Illinois for the regulation of the business of making loans approved June 14, 1917, in force July 1, 1917, the said loan is entirely void and plaintiff has no right to collect or receive any principal, interest or charges whatsoever." The court entered an order "that

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4452 J. Neurosci., September 24, 2008 • 28(39):4445–4452

Journal of Management Education 33(10)

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Source: U.S. Census Bureau, *U.S. Economic Outlook*, 1975, p. 10.

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said judgment be opened, that leave be and hereby is given to the defendant to make defense herein, that a trial of this cause be had notwithstanding said judgment and that said judgment stand as security." Thereafter the cause came on for trial before the court without a jury, and after the hearing of evidence the court found the issues against the plaintiff and judgment was entered on the finding. The plaintiff prayed an appeal but did not prosecute it and did not preserve the evidence by a bill of exceptions. On December 30, 1926, the plaintiff moved the court to vacate the finding and judgment of April 30, 1926, and a petition, supported by an affidavit, was filed in support of the motion. The petition recites the entry of the judgment by confession and also the motion of the defendants to vacate and set aside the same and the action of the court in reference thereto, and it avers "that it was the claim of the defendants that the note upon which your petitioner had entered judgment by confession, called for and required the payment of a greater sum of money, as interest, than 7%. Petitioner avers that the proof adduced by the said defendants was to the effect that the note contained a charge of 20% interest and that the loan was for the sum of Two Hundred (\$200.00) Dollars and the note given, on which the judgment was entered, was for Two Hundred Forty (\$240.00) Dollars, and that the Forty (\$40.00) Dollars added to the amount represented interest. Your petitioner is informed by counsel and upon such information states such fact to be that the Court so found from the evidence adduced that the money loaned was but Two Hundred (\$200.00) Dollars and that the interest charged was Forty (\$40.00) Dollars, and that the entire transaction took place in the said City of Chicago, and because of this, vacated said judgment and entered judgment against your petitioner. Your petitioner

shows that it did not appear to the Court and the defendants did not prove to the Court, nor was it made manifest by any evidence whatsoever on the hearing of said motion and the trial of said cause, that your petitioner was at the time of the making of said loan of \$200.00 a licensee of the Department of Trade and Commerce of the State of Illinois, or that your petitioner, at the time of the making of said loan, or at any time, had obtained a license to make loans in the sum of Three Hundred (\$300.00) dollars or less. Your petitioner avers that he is informed by counsel that proof to the effect that your petitioner was a licensee, duly licensed by said Department of Trade and Commerce of the State of Illinois to make loans, was essential and necessary before the said law hereinbefore set forth was applicable to him. Your petitioner therefore prays that the judgment ^{entered} by this Honorable Court in the above entitled cause on the 30th day of April, A. D. 1936, in favor of the defendants and against your petitioner may be set aside and held for naught." The motion of the plaintiff was made under Section 89 of the Practice Act, which abolishes the writ of error coram nobis and provides that all errors in fact committed in the proceedings of any court of record which by common law could have been corrected by that writ may be corrected by the court in which the error was committed by motion made at any time within five years after the rendition of final judgment in the case. The plaintiff contends that "the error of fact pointed out by the petition and admitted by defendants was that defendants had failed to aver or show that plaintiff was a licensee of the Department of Trade and Commerce of Illinois, and by reason of this omitted fact the Court applied the law applicable to a licensee to plaintiff. When, if the Court had known the fact, that plaintiff was not a licensee, the

showed that in his not appear to be a true and the defendant was not
not have to the Court, but was it was handled by the defendant
wherever on the basis of said motion and the trial of said motion
that your petition was at the time of the making of said motion of
1880.00 a license of the Department of Trade and Commerce of the
State of Illinois, or that your petition, at the time of the making
of said motion, or at any time, had obtained a license to make known
in the sum of three hundred (\$300.00) dollars or less. Your petition
shows that you are in business by yourself and have no other
that your petition was a license, only licensed by said Department
of Trade and Commerce of the State of Illinois to make known, and
material and necessary to the said Department for their
use and service to the State. Your petition, however, does not
show that you have been in the above entitled office on the
20th day of April, 1880, in favor of the defendant and against
your petition was in the said and that the motion. The motion
of the plaintiff was made under the name of the defendant and against
abolition the said of your business and provided that all persons
in fact committed in the prosecution of any kind of business which by
common law would have been considered by this Court as a business
and that in which the State was entitled to make known as per law
which law provides that the Commission of Trade and Commerce of the State
The plaintiff contends that the State of Illinois has the right
petition was admitted by defendant and that defendant was liable to
pay on this plaintiff was a license of the Department of Trade
and Commerce of Illinois, and it is said that this motion of the Court
applied the law applicable to a license to plaintiff, when, it is
said that the State, that plaintiff was not a licensee, the

Act in question would not have been applied, " * " and it was error to deny plaintiff's petition and motion to vacate the judgment against him of April 30, 1946." Errors of fact which may be corrected by motion under Section 89 of the Practice Act or by writ of error coram nobis are not such questions of fact as arise upon the pleadings in the case or such questions as constitute the basis of such action of defense, but are such errors as refer to the disability of parties, the incapacity of the plaintiffs to sue or the disability of the defendants to defend, infancy, coverture, death of one or more of the parties, death of a joint party, insanity, or the like, and which, if known to the court would have precluded the rendition of the judgment. The writ will not lie for error or mistake of the judge in point of law, but a writ of error or appeal must be sued out to a superior court to correct such error. (Marabia v. Thompson Hospital, 309 Ill. 147. See also McGulley v. White, Ill. App. Ct., Gen. No., 32343.) In plaintiff's petition the only alleged error of fact is, that defendants failed to aver or show that plaintiff was a licensee of the Department of Trade and Commerce of Illinois. It is too plain for discussion that while the plaintiff claims that the failure of the defendants to show that plaintiff was a licensee, etc., constituted an error of fact, the actual charge is that the court committed an error of law, and if the plaintiff felt himself aggrieved thereby he should have prosecuted a writ of error or an appeal from the judgment.

The plaintiff avers, but does not argue, that his motion might also be considered as in the nature of a bill of equity to vacate a judgment. Even if it be treated as such there is no fact set up in the petition that would warrant the vacating of the judgment of the Municipal Court. "It is well settled that equity will

The following is a list of the names of the persons who have been appointed to the various committees of the House of Representatives, and the names of the persons who have been appointed to the various committees of the Senate, for the session of 1901-1902.

Committee	House of Representatives	Senate
Committee on Agriculture	Mr. Smith	Mr. Jones
Committee on Commerce	Mr. Brown	Mr. White
Committee on Education	Mr. Green	Mr. Black
Committee on Finance	Mr. Hall	Mr. Gray
Committee on Foreign Relations	Mr. King	Mr. Lewis
Committee on Indian Affairs	Mr. Nelson	Mr. Parker
Committee on Interstate Commerce	Mr. Reed	Mr. Scott
Committee on Labor	Mr. Taylor	Mr. Walker
Committee on Land	Mr. Young	Mr. Adams
Committee on Military Affairs	Mr. Baker	Mr. Miller
Committee on Naval Affairs	Mr. Clark	Mr. Davis
Committee on Rivers and Harbors	Mr. Evans	Mr. Foster
Committee on Rivers and Harbors	Mr. Gibson	Mr. Hart
Committee on Rivers and Harbors	Mr. Hendon	Mr. Johnson
Committee on Rivers and Harbors	Mr. Keith	Mr. Lester
Committee on Rivers and Harbors	Mr. Martin	Mr. Nichols
Committee on Rivers and Harbors	Mr. Owen	Mr. Phillips
Committee on Rivers and Harbors	Mr. Quinn	Mr. Rogers
Committee on Rivers and Harbors	Mr. Russell	Mr. Stewart
Committee on Rivers and Harbors	Mr. Tamm	Mr. Turner
Committee on Rivers and Harbors	Mr. Vance	Mr. Wells
Committee on Rivers and Harbors	Mr. Warren	Mr. Wilson
Committee on Rivers and Harbors	Mr. Wright	Mr. Wood
Committee on Rivers and Harbors	Mr. Wyatt	Mr. Young
Committee on Rivers and Harbors	Mr. Zane	Mr. Allen

not interfere with the enforcement of a judgment at law, unless the judgment debtor could not have availed himself of his defense at law, or was prevented from so doing by the fraud of the opposite party, or by accident or mistake unmixed with fault or negligence on his own part. See 12 Am. & Eng. Enc. of L., 145, cases cited in note 5." (Bardonski v. Bardonski, 144 Ill. 284.)

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

Barnes, J. J., and Gridley, J., concur.

280 - 32221

PAUL BLOOM,
Appellee.

v.

SAMUEL HANDELSMAN and
ESTHER HANDELSMAN,
Appellants.APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Paul Bloom, plaintiff, sued Samuel Handelsman and Esther Handelsman, defendants, in the Circuit Court of Cook County in an action in assumpsit. There was a trial before the court without a jury and the issues were found in favor of the plaintiff and his damages were assessed at \$4800. Judgment was entered on the finding and this appeal followed. The declaration consisted of a special count and the common counts. The plaintiff and the defendants entered into a written contract in which the defendants agreed to convey to the plaintiff certain real estate in Chicago in accordance with the terms and provisions of the contract. The contract was never consummated and the plaintiff in the present action sued to recover from the defendants \$5000 that he had deposited with the defendants as earnest money in accordance with the terms of the contract. It appears that some time after the making of the contract the defendants, claiming that the plaintiff had wrongfully refused the defendants' tender of title, declared the contract null and void and retained the earnest money as liquidated damages for the alleged breach by the plaintiff. The plaintiff claimed that the defendants failed to tender the plaintiff a good title, in accordance with the terms of the

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contract, and that the action of the defendants in declaring the contract null and void and in retaining the earnest money was a wrongful one and in disregard of the rights of the plaintiff.

The defendants contend "that the amended declaration did not state a cause of action, because of plaintiff's failure to allege performance or waiver thereof, of the condition in the contract that he delivered his written list of objections to the title within ten days after receipt of the abstract." It is a sufficient answer to this contention to say that as the proof shows a wrongful rescission of the contract by the defendants the plaintiff had the right to recover the earnest money under the common counts of the declaration. "Where a contract is rescinded, assumpsit for money had and received will lie to recover money paid thereon." (Puterbaugh's Com. Law Fl. & Pr., 10th Ed., p. 161. See also McClintock v. Lake Forest University, 222 Ill. App. 466, and cases cited therein; Banton v. Clifford, 68 Ill. 67, 69-70.) The plaintiff, by filing the present suit, acquiesced in the rescission by the defendants.

The defendants contend "that defendants' tender of title was sufficient, and upon plaintiff's refusal to perform, they were justified in retaining the earnest money pursuant to the contract." The plaintiff made a number of objections to the defendants' tender of title and several of these, at least, were good. By the terms of the contract plaintiff agreed to accept the conveyance subject "to a trust deed of record to secure the payment of \$120,000 due about January 1930, except prepayments of \$6,000 per year payable as provided therein, the first prepayment of \$6,000 due Jan. 1925," when, as a matter of fact, the said mortgage, instead of being payable \$6000 in annual prepayments, was payable in monthly

installments of \$600 in advance. The defendants contend that the plaintiff by his contract agreed to assume the mortgage of record and that he cannot avoid his purchase because he did not acquaint himself with the particular terms of the encumbrance, and that he is chargeable with knowledge of the contents, terms and conditions of the same. It is undoubtedly the law that where a reference is made in a contract to a mortgage in general terms the purchaser is chargeable with notice of all that the record shows, but it is also the law that where express representations concerning the provisions of an encumbrance are made in the contract, the purchaser may rely upon such representations. In Baughar v. Stewart, 122 N. Y. Supp. 202, and Feltenstein v. Ernst, 97 N. Y. Supp. 376, 378, cited by the defendants, this distinction is recognized. There was a material difference between the encumbrance of record and the one agreed upon in the contract and the plaintiff was justified in making the objection in question. (See Feiss v. Glanitz, 203 Ill. App. 246.)

It also appears that one of the objections urged by the plaintiff to the defendants' title was that the premises in question were subject to a second mortgage to secure forty-eight notes aggregating \$16,200, which mortgage was not contemplated by the contract. The defendants tendered a release by the trustee of this mortgage and they contend that the plaintiff was not justified in objecting to such a tender. We have carefully examined the evidence with respect to this tender and we are satisfied that the plaintiff was fully justified in refusing to accept the same. The release deed was executed before maturity of the notes and the latter were not produced at the time of the tender, and it was admitted that they had not been paid and that they had not been cancelled, and that the owner of the notes was consenting to a

release of the mortgage as an accommodation to his brother, Samuel Handelman, the mortgager, to enable the latter to close the deal with Bloom. The fact that the alleged owner of the immature notes was present at the time of the tender and that he there stated that he authorized the trustee to release the mortgage, did not preclude the plaintiff from insisting that the notes be produced with the tender of the release deed. None of the cases cited by the defendants supports their present contention when it is considered in the light of the facts in the instant proceeding.

On June 23, 1934, the defendants notified the plaintiff in writing that on June 30, 1934, at the office of Irving H. Flamm, their attorney, " * * * we will arrange a tender of said deed and comply with said contract in all respects and require the same of you. * * * Should you, however, fail to so notify me or to appear at said time and place for the purpose of closing this deal, we will retain the \$5,000 earnest money heretofore paid by you to apply on expenses already incurred herein and as liquidated damages and thereafter declare the contract to be null and void." At the time in question the parties met and the plaintiff refused to accept the tender of the deed offered by the defendants on the ground that the defendants had not complied with the terms of the contract, and we are satisfied that the plaintiff was justified, under the facts, in refusing the said tender. The defendants' attorney then stated: "If you leave this room without complying with the contract, we will declare this contract null and void and will apply the earnest money for expenses already incurred and as liquidated damages for the breach thereof by your client," and the bill of the defendants in the chancery proceedings alleges that at that time and place they "retained said earnest money as liquidated damages and for expenses incurred by your orators

by reason of said contract. It cannot be said that the defendant called the meeting on June 22, 1914, and for the purpose of communicating the contract and with the object of creating a precedent for the retention of the contract money.

The defendant's contract with the plaintiff was

alleged that he (the plaintiff) ever refused to receive the "contract," and that therefore the plaintiff has no right to demand the return of the contract money. It is a well-known fact that this contention is not the plaintiff's by reason of his claim in the present suit whereby he was appointed in the position of the contract by the defendant. The defendant's bill in equity alleges that the plaintiff on June 22, 1914, after the defendant had made the contract with him, "communicated" the contract to the plaintiff in order to make payment.

The defendant's contract with the plaintiff was that the

plaintiff was not entitled to receive the contract. This contention, as well as several other points by the defendant, are based on the contention that the plaintiff, in the time before, received the contract, whereas the plaintiff clearly shows that the defendant knowingly retained the contract with him and retained the contract money as if the contract was not. Two things were shown by reason of the contract, and the plaintiff by reason thereof had the right to file the present suit.

The defendant's contract with the plaintiff was

alleged that the plaintiff by reason of the contract, was entitled to a share in the defendant's bill, and defendant's were therefore entitled to a share in the contract money for expenses and fees in value during the period when the contract was retained, and that the contract was retained as a precedent for the plaintiff to show a loss alleged to have

by reason of said contract." We cannot escape the conclusion that the defendants called the meeting on June 30, 1934, not for the purpose of consummating the contract but with the object of creating a pretext for the retention of the earnest money.

The defendants contend that "the record does not disclose that he (the plaintiff) ever elected to rescind the contract," and that therefore the plaintiff has no right to demand the return of the earnest money. It is a sufficient answer to this contention to say that the plaintiff by asserting his claim in the present suit thereby acquiesced in the rescission of the contract by the defendants. The defendants' bill in chancery alleges that the plaintiff on June 30, 1934, after the defendants declared the contract null and void, "abandoned all right, title or interest in and to said premises."

The defendants contend that the proof shows that the plaintiff was not entitled to rescind his contract. This contention, as well as several others urged by the defendants, proceeds on the assumption that the plaintiff, in the first instance, rescinded the contract, whereas the proof clearly shows that the defendants wrongfully declared the contract null and void and retained the earnest money as liquidated damages and for alleged expenses incurred by reason of the contract, and the plaintiff by reason thereof had the right to file the instant suit.

The defendants contend that "the chancery decree adjudicated that plaintiff by recording the contract, wrongfully maintained a cloud on defendants' title, and defendants were therefore entitled to set-off, or at least recoup losses for expenses and decline in value during the period such cloud was maintained," and that the court erred in striking out certain testimony offered by the defendants to show a loss alleged to have

been sustained by them by reason of the decline in value of the property between the time of the filing of the chancery suit and the entry of the decree in the same. We find it somewhat difficult to follow the argument of the counsel as to the present contention. As we understand it, they concede that the plaintiff had the right to record the contract in the first instance, but they insist that he had no right to resist the chancery suit to remove the cloud created by the recording of the contract, and that the said resistance obliged the defendants to withhold the property from sale in the open market until the decree was entered and that they thereby sustained a loss because of a decline in the value of the property, and that they were entitled in the present suit to recoup and set-off the said loss they suffered, and they further insist that they offered proper evidence to prove such a loss and that the court erred in holding that the evidence offered was improper and in striking out the same. We have heretofore held that the defendants in declaring the contract null and void ^{and} in retaining the earnest money acted wrongfully and in disregard of the rights of the plaintiff, and it seems a complete answer to the present contention to say that under all the circumstances it was not incumbent upon the plaintiff to remove the cloud created by the recording of the contract, especially while the defendants retained the earnest money that in equity and good conscience belonged to the plaintiff, and it does not lie in the mouths of the defendants to make the complaint involved in the present contention. Moreover, it would appear from the record in the chancery suit, that the plaintiff made no opposition to a decree, as soon as it clearly appeared that the complainants merely desired a removal of the cloud on the property.

The defendants contend that "the chancery decree is an

been satisfied by them by reason of the decision in favor of the
 property between the time of the taking of the property and the
 the entry of the decree in the case. It is also to be noted that
 to follow the argument of the counsel as to the present condition.
 As we understand it, they contend that the plaintiff has the right
 to recover the contract in the first instance, but they insist that
 he had no right to recover the property until he removed the cloud
 created by the recording of the contract, and that the same is
 otherwise obliged the defendant to remove the property from sale
 in the open market until the proper one is entered and that they
 thereby sustained a loss because of a decision in the value of the
 property and that they were entitled in the present suit to recover
 and to set the case aside and they contend, and they further insist
 that they offered proper evidence to prove such a loss and that
 the court was in error in refusing to set the case aside and to
 set it aside and to grant a new trial. It is also to be noted that
 defendant in seeking the contract will not be obtaining the
 contract money, which was paid in the first place, and in the event of
 the plaintiff, and it seems a perfectly proper course in the present case
 to allow to any case under all the circumstances it was not incumbent
 upon the plaintiff to remove the cloud created by the recording of
 the contract, especially since the defendant retains the contract
 money and is entitled to the contract money and the plaintiff
 and it does not lie in the mouth of the defendant to make the
 plaintiff involved in the present condition. Moreover, it would
 appear from the facts in the present case, that the plaintiff
 made an application to a court, as soon as it filed its petition that
 the complainant should be decreed a removal of the cloud on the
 property.

adjudication of all of the issues raised by plaintiff in his declaration, because such issues might have been adjudicated in that suit." It appears that after the plaintiff sued the defendants in the instant case, and while the case was still pending, the defendants filed a bill in the Circuit Court of Cook County against the plaintiff and Samuel T. Horvitz, in which they alleged that the plaintiff caused to be recorded the written contract for the sale of the premises in question and that said contract so recorded created a cloud on the title of the complainants, and "that on April 26, 1924, the defendant Bloom entered into a written contract with one Samuel T. Horvitz, also defendant herein, whereby said Bloom agreed to sell a half interest in said premises to said Horvitz; that said contract between defendants was caused to be recorded on May 9, 1924, as Document 8408583, and that same also creates a cloud upon your orators' title, although neither of said defendants have any right, title or interest in said premises," and the complainants prayed "that said two contracts be removed and declared of no effect as a cloud upon their title." The bill also alleged that "said defendant refused to accept your orators' title and pay the amount required under the provisions of said contract, whereupon your orators retained said earnest money as liquidated damages and for expenses incurred by reason of said contract. That thereupon said defendant abandoned all right, title or interest in said premises, and has since commenced an action at law for the recovery of his earnest money alleging in said action that your orators' title was defective." It would appear from the record before us that the defendant Horvitz was not served with summons in the chancery proceedings. The defendant Paul Bloom filed an answer to the bill and the complainants filed exceptions to the same and the exceptions were sustained and a decree pro

confesso upon the bill was entered, in which "the contracts between complainants and defendant Bloom recorded as document No. 8367553 and between the defendant Bloom and the defendant Horvitz recorded as document No. 8408583, hereby are both declared to be null and void as a lien or cloud against said premises or the title thereto or any right or interest therein." It would seem clear that the claim of the plaintiff in the instant case was not actually in issue in the chancery proceedings, nor was the determination of the merits of the said claim essential to the judgment in that case, and therefore, under the pleadings in that case, the contention of res adjudicata is not sustained. (See White v. Sherman, 168 Ill. 589, 612; Fineman v. Goldberg, 329 Ill. 507, 511.) "It is also well settled that when the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted upon the determination of which the finding or verdict was rendered." (Public Utilities Com. v. Smith, 298 Ill. 151, 161-162.) Bloom, in his answer to the bill, admitted that he had filed the instant suit to recover the earnest money, and, as we have heretofore said, the commencement of the present proceeding constituted an acquiescence by him in the rescission of the contract by the Handelsmans, and as the latter, in the chancery case, did not ask that the law suit be restrained the chancellor was warranted in assuming, under the pleadings, that Bloom's claim for a return of the earnest money was not a material issue in the chancery proceedings and that both parties considered that the merits of that claim should be determined in the law suit.

CHANGES upon the bill was entered, in which "the committee between amendments and amendments" was recorded as follows: "The committee on the bill was instructed to report the bill as amended." The committee on the bill was instructed to report the bill as amended.

It is also noted that the bill was amended in the following manner: "The committee on the bill was instructed to report the bill as amended." The committee on the bill was instructed to report the bill as amended.

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We have patiently and carefully considered the many contentions of the defendants and we are satisfied that none of them has substantial merit. The defendants have for a number of years wrongfully retained the earnest money that in equity and good conscience belongs to the plaintiff. The judgment of the Circuit Court is a just one and it should be and it is affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.

S. G. FOURNIER,
Appellee,

vs.

WISWELL RADIO COMPANY,
a Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE SCASLAN DELIVERED THE OPINION OF THE COURT.

S. G. Fournier brought an action in tort in the Municipal Court of Chicago against Wiswell Radio Company, a corporation, and Arthur E. Akersyd. Akersyd was not served with a summons and his appearance was not filed. The case was tried before the court without a jury and after evidence heard the court found the defendant Wiswell Radio Company guilty, and assessed the plaintiff's damages at \$421. Judgment was entered on the finding and this appeal followed.

The plaintiff sued to recover compensation for damages to his automobile alleged to have been caused by the carelessness of the defendants in the operation of an automobile possessed, operated and driven by them. In its affidavit of merits the defendant Wiswell Radio Company denies "that the defendant Wiswell Radio Company, a corporation, by and through its agents, servants or representatives, possessed, operated, controlled and drove a certain automobile at the time and place set forth in plaintiff's statement of claim herein, and denies that said defendant by and through its agents, servants and representatives operated the said automobile in manner and form set forth in plaintiff's statement of claim."

The defendant raises a number of contentions in support of its claim that the judgment should be reversed, but we deem it necessary to refer to only one, viz., that the burden of

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THE UNITED STATES OF AMERICA
BY ATTORNEY

IN SENATE
JANUARY 10, 1900
REPORT
OF THE
COMMISSIONER
OF THE
LAND OFFICE

THE UNITED STATES OF AMERICA

U. S. DEPARTMENT OF THE INTERIOR

REPORT OF THE COMMISSIONER OF THE LAND OFFICE

FOR THE YEAR ENDING JUNE 30, 1899

AND HIS ASSISTANTS

AND HIS ASSISTANTS

AND HIS ASSISTANTS

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AND HIS ASSISTANTS

THE UNITED STATES OF AMERICA

BY ATTORNEY

IN SENATE

JANUARY 10, 1900

REPORT

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COMMISSIONER

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FOR THE YEAR ENDING

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AND HIS ASSISTANTS

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proof was upon the plaintiff to prove that at the time of the accident the automobile driven by Akeroyd was being used by the latter within the scope of his employment, and that the finding of the court as to that issue was not warranted by the evidence, and the judgment should therefore be reversed. The plaintiff attempted to make out a prima facie case that the automobile that collided with his car was owned and operated by the defendant at the time of the accident, by testifying, over the strenuous objections of the defendant, that after the happening of the accident the driver of the automobile, Arthur E. Akeroyd, approached him and stated (inter alia) that he worked for the Wiswell Radio Company, that he had been out south delivering a package for that company and that at the time of the accident he was in a hurry to get back downtown, and that he supposed that the Wiswell Radio people had insurance. This was the only evidence offered by the plaintiff to support the allegation in the statement of claim that the Wiswell Radio Company owned and operated the machine in question at the time of the accident. It is not necessary to cite authorities to show that this evidence was incompetent. In fact, the plaintiff does not dispute the contention that it was error to admit the same. When the plaintiff rested his case, the court overruled the motion of the defendant for a finding in its favor, and thereupon the defendant, instead of standing by its motion, introduced evidence in its behalf. The plaintiff was therefore entitled to the benefit of any evidence introduced by the defendant that helped to make out his case. (Geldie v. Werner, 151 Ill. 351, 354.) The plaintiff, apparently, concedes that when he closed his case he had not made out a prima facie case by competent evidence, but he claims that L. C. Wiswell, president of the defendant company, who testified for the defendant, admitted that the defendant owned the automobile in question and that Akeroyd was an employee of the defendant, and that therefore

this evidence "raises the legal presumption that when the automobile struck plaintiff's automobile, it was being used in the course of the defendant's business." Howard v. Amerson, 236 Ill. App. 537, cited by plaintiff, undoubtedly sustains the plaintiff's position. The defendant answers that this presumption in the present case was completely overcome by the evidence of the defendant and that as the plaintiff thereafter failed to introduce further evidence on the issue in question the defendant was entitled to a verdict. In Gaborn v. Gaborn, 328 Ill. 329, it is said: "Presumptions are never indulged in against established facts. They are indulged in only to supply the place of facts. As soon as evidence is produced which is contrary to the presumption which arises before the contrary proof was offered the presumption vanishes entirely. (1 Jones' Com. on Evidence, 75.)" To the same effect is Gielbeck v. Grothman, 248 Ill. 438. The defendant Akeroyd testified for the defendant company. At the time he gave his evidence he was living in North Carolina and was no longer an employee of the defendant company. He testified that at the time of the collision he was using the automobile solely for his own pleasure and that he was then bound for the "movies;" that he was not using it at the time of the accident for business purposes on behalf of the Wiswell Radio Company. After a careful examination of the record we have reached the conclusion that the other facts and circumstances in the case corroborate this evidence.

The plaintiff insists that the trial court disregarded Akeroyd's evidence as false and that therefore the prima facie case made out by the plaintiff was not overcome by the defendant. It is a sufficient answer to this contention to say that it clearly appears from the record that the finding of the trial court as to the credibility of Akeroyd was based upon the fact that the court assumed that the alleged admissions of Akeroyd were competent evidence and acted upon it, to the prejudice of the defendant.

Under the pleadings in this case it was necessary for the plaintiff to prove that at the time of the accident, the automobile, driven by Akeroys, was being used by the latter within the scope of his employment, and he has failed in this regard.

Since the case was tried by the court without a jury, a finding of facts will be entered in this court and judgment entered here for the defendant.

REVERSED WITH A FINDING OF FACTS.

Barnes, P. J., and Gridley, J., concur.

Since the knowledge is that there is no possibility of
the plaintiff to prove that at the time of the accident, the witness
was not at the scene, the fact that he was at the scene is
evidence of his negligence, and he has failed to prove
that the fact that he was at the scene is not a fact.
A finding of fact will be made in this case and judgment entered
thereon as the law requires.
JUDITH ANN & DAVID M. JONES

Witness, J. H. and J. H. Jones, Jr., sworn.

[The following text is extremely faint and largely illegible, appearing to be a series of lines of text, possibly a deposition or a list of items.]

FINDING OF FACTS.

We find, as ultimate facts in the case, that at the time of the accident in question the automobile of the defendant, driven by Akeroyd, was not being used by the latter, at the time and place in question, within the scope of his employment, and that the defendant was not guilty of the negligence charged in the amended statement of claim.

THE STATE OF TEXAS,

COUNTY OF DALLAS,

do hereby certify that the within and foregoing is a true and correct copy of the original as the same appears from the records of the County of Dallas, State of Texas.

Witness my hand and seal of office this 1st day of January, 1901.

JOHN W. HARRIS, County Clerk.

My commission expires the 1st day of January, 1902.

JOHN W. HARRIS, County Clerk.

Attest my hand and seal of office this 1st day of January, 1901.

ANNE DELSON,
Defendant in Error,
v.
H. JAY DELSON,
Plaintiff in Error.

ERROR TO SUPERIOR COURT,
COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

The plaintiff, Anne Delson, on February 18, 1927, in the Superior Court of Cook County, secured a judgment by confession in the sum of \$1630 against the defendant, H. Jay Delson. On September 9, 1927, the defendant filed his special appearance "for the sole purpose of making a motion to vacate the judgment heretofore entered in the above entitled cause, and for no other purpose whatsoever." Thereafter the defendant moved the court to set aside the judgment and to declare the same coram non iudice and void. This writ of error followed the entry of an order overruling this motion. The plaintiff has not filed an appearance or a brief in this court.

The statement of claim alleges that the defendant, on July 9, 1926, made and executed a good and sufficient undertaking in writing and delivered the same to the plaintiff, by which he promised to pay to the plaintiff the sum of \$50 per week, for and during the term of her natural life or until she remarried; that the plaintiff, since the execution and delivery of the undertaking, has not remarried, and that since July 9, 1926, she has received from the defendant, on account of the said undertaking, the sum of \$170, and that there is due the plaintiff the sum of \$1480.

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The said undertaking is attached to and made a part of the declaration.
It reads as follows:

"This Memorandum Witnesseth That
Whereas the undersigned H. Jay Nelson did on the 25th day of June, A. D. 1926, make and enter into a certain agreement in writing with Anne Nelson in and by which agreement the said H. Jay Nelson for the considerations therein more fully set forth covenanted and agreed to make, execute and deliver to the said Anne Nelson a good and sufficient undertaking in writing containing the terms, covenants and agreements hereinafter set forth.

Now, therefore, in consideration of the premises and in pursuance of the terms and provisions of the above mentioned agreement dated the 25th day of June A. D. 1926, the undersigned, H. Jay Nelson does hereby covenant and agree to pay to the said Anne Nelson the sum of Fifty Dollars (\$50.00) per week, commencing with this date, for and during the terms of her natural life or until she shall remarry.

And in the event of the re-marriage of the said Anne Nelson, the undersigned, H. Jay Nelson does hereby covenant and agree to pay to the said Anne Nelson the sum of Twenty-five (\$25.00) Dollars per week for each week thereafter so long as she shall continue to maintain and support Bertram Nelson, the son of the said H. Jay Nelson and Anne Nelson or until the said Bertram Nelson shall attain the age of eighteen (18) years.

And for the considerations aforesaid, I do hereby irrevocably authorize any attorney of any court of record to appear for me in such court in term time or vacation at any time after default in the payment of any installment when the same falls due under this agreement and confess a judgment without process in favor of the said Anne Nelson for such amount as may then be due and unpaid under the terms of this agreement together with costs and reasonable attorney's fees and to waive and release all errors which may intervene in any such proceedings and consent to immediate execution upon said judgment, hereby ratifying and confirming all that my said attorney may do by virtue thereof. Dated - July 9, 1926.

H. Jay Nelson (Seal)*

There was also attached to the declaration an affidavit by the plaintiff that she is acquainted with the handwriting of the defendant, H. Jay Nelson, and that the signature of the said undertaking and power of attorney is the genuine signature of the said Nelson. The plaintiff did not file an affidavit of claim with her declaration. The cognovit admits that there is due the plaintiff, including the sum of \$150 for her reasonable attorney's fees, \$1630. There is no

recital in the judgment order that the court heard any evidence before the entry of that order.

The defendant contends that the judgment was coram non iudice and void, for the reason that neither the statute nor the common law authorizes a judgment by confession where the nature of the subject matter involved requires the hearing of evidence and a judicial investigation to determine the amount due the plaintiff, if any; that a person cannot authorize another to confess judgment where the amount alleged to be due is uncertain and unliquidated. After a careful consideration of this contention we have reached the conclusion that it is meritorious. In Little v. Dyer, 138 Ill. 272, it was held that a power of attorney for the confession of a judgment for the sum due is not authorized by the statute nor at common law in a case where the amount of the judgment is not fixed in the power, and depends upon the hearing of evidence dehors the obligation on which it is based and to which the power is attached; that where a judicial investigation and hearing of evidence other than that afforded by the document itself is necessary to determine the amount due by the terms of the document there can be no confession of judgment in such case. In Fortune v. Bartolomei, 164 Ill. 51, the court adhered to the rule laid down in Little v. Dyer, supra, and stated that the power to confess judgment for an indefinite sum is invalid, but further held that a judgment by confession for an ascertained amount will not be set aside though the power of attorney provides also for the confession of judgment for an unliquidated amount, where the provisions are severable, and judgment for only the ascertained amount is confessed. In Reber v. Powers, 213 Ill. 370, it was held that a judgment by confession must be for a fixed and definite sum, and not in confession of a fact, that can only be established by testimony outside of the written

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Because the only at-risk group

www.sagepub.com at 128.190.254.114 by [128.190.254.114] on 12 May 2015

Source: The author's calculations based on data from the 1990 Census of the United States.

patients to include all eligible patients using the following:

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1. The first group of variables includes the demographic characteristics of the respondents, such as age, gender, and education level. These variables are used to control for potential confounding factors that may influence the relationship between the independent and dependent variables.

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THESE RESEARCHES ARE PART OF A PROJECT OF THE INSTITUT DE RECHERCHES EN SCIENCE DE L'INFORMATION ET DE LA COMMUNICATION (IRSEC) DE L'UNIVERSITE DE LYON, FRANCE.

2. The Government, in its efforts to protect the public interest, should not be allowed to sue on behalf of the public.

Approved for release by NSA on 08-28-2014 pursuant to E.O. 13526

It is important to understand that the results of this study are not generalizable to all populations. The study was conducted in a specific population and the results may not be applicable to other populations. Therefore, the results of this study should be interpreted with caution.

Das, als erstes ein bestimmtes, und dann, mehrere Beispiele...

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lower. 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

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documents, required by the statute to be filed in order to enter up a judgment by confession. (See also Brown v. Atwood, 200 Ill. App. 310, 314.) The court, in Feber v. Powers, *supra*, takes occasion to emphasize the fact that it is the settled doctrine of this state that the authority to confess a judgment without process must be clear and explicit, and must be strictly pursued. One of the cases cited in support of this doctrine is Little v. Lyer, *supra*.

In the instant case the undertaking refers to a certain agreement in writing between the plaintiff and the defendant, dated June 30, 1926, and states that "in pursuance of the terms and provisions of the above mentioned agreement" the defendant covenants and agrees to pay to the plaintiff the sum of \$50 per week, etc., and it might be necessary for the court, before a judgment could be entered, to ascertain by proof if the terms and conditions of the said agreement had been complied with. It is clear that in order to determine what amount, if any, the plaintiff was entitled to, it would be necessary to hear testimony as to whether or not she had remarried, and if she had remarried, whether or not she had maintained and supported the son, Bertram Nelson. The age of the latter was also a material inquiry. It will be noted that the plaintiff obtained a judgment based upon the assumption that she was entitled to \$50^{per} / week, and it will be further noted that the plaintiff did not file an affidavit of claim with the declaration.

We hold that the judgment of the Superior Court of Cook County, based upon the warrant of attorney in question, is void, and the said judgment is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

Barnes, P. J., and Gridley, J., concur.

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IN THE MATTER OF THE PETITION
OF JOSEPH MAJEWSKI UNDER THE
INSOLVENT DEBTORS' ACT.

ERROR TO COUNTY COURT
OF COOK COUNTY.

ELEANOR DURINA,
Respondent-Plaintiff in Error.

MR. JUSTICE SCAMLAN DELIVERED THE OPINION OF THE COURT.

This is a writ of error prosecuted by Eleanor Durina to reverse an order entered in a proceeding in the County Court of Cook County under the Insolvent Debtors' Act (Cahill's St., ch. 72) discharging Joseph Majewski, the petitioner in said proceeding. Eleanor Durina filed a suit in the Superior Court of Cook County against the petitioner in an action in case. The declaration in said cause originally consisted of five counts but the first, third, fourth and fifth were dismissed by the plaintiff and the cause went to trial on the second count alone, which alleged, in substance, that on October 8, 1925, at Chicago, Illinois, the plaintiff, a minor of the age of sixteen years, was on Troy street, a public highway near West 26th street, and in the exercise of ordinary care for her own safety, "and the defendant was then and there possessed of and driving a certain automobile upon and along said Troy street, as he was approaching West 26th street, and when danger was imminent, the said defendant then and there knowingly and wantonly drove said automobile upon, against and over the plaintiff, whereby she was greatly hurt," etc. The defendant filed a plea of the general issue. There was a trial before the court with a jury and a verdict returned finding the defendant guilty and assessing the plaintiff's damages at the sum of \$25,000. After judgment was entered upon the verdict the petitioner failed to pay the same and he was arrested under a

REPORT

1911

IN THE MATTER OF THE ESTATE OF
JAMES H. HARRIS, DECEASED
ADMINISTRATOR

IN SENATE

COMMITTEE ON FINANCE

REPORT

OF THE COMMISSIONERS OF THE LAND OFFICE

IN RESPONSE TO A RESOLUTION PASSED BY THE SENATE

APRIL 1, 1911

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writ of habeas ad satisfaciendum, which was issued at the instance of the plaintiff in error. Thereupon the petitioner filed the said petition in the County Court by which he asked to be discharged under section 2 of the Insolvent Debtors' Act (Ganill's St., ch. 72, par. 5) on the ground that malice was not the gist of the action in the case in the Superior Court. On the hearing of the petition the court had before it the record of the Superior Court consisting of the declaration, the plea, the orders, the verdict of the jury and the judgment entered thereon, and upon such proof made a finding that malice was not the gist of the action in said cause and entered a judgment in favor of the petitioner and ordered that he be released and discharged from imprisonment upon complying with the conditions of the Insolvent Debtors' Act.

The plaintiff in error contends that the court erred in releasing and discharging the prisoner from imprisonment and custody, and the only question to be decided upon this appeal is whether malice was the gist of the action in the Superior Court in the sense that the word malice is used in section 2 of the Insolvent Debtors' Act.

The sole count in the declaration charges that "when danger was imminent, the said defendant then and there knowingly and wantonly drove said automobile upon, against and over the plaintiff," and the general verdict by the jury is a finding that the defendant was guilty of this charge. If there are several counts in a suit and malice is the gist of only one of them, a judgment upon a general verdict is not conclusive that there was malice, and the debtor, upon petitioning for his discharge from imprisonment, may show the verdict was upon counts of which malice was not the gist, but if it appears from the pleadings in the civil suit under which an insolvent debtor was

imprisoned that malice is the gist of the entire action, the judgment in such case is conclusive of the question of malice, and is res judicata. (Jernberg v. Mix, 199 Ill. 254.) In that case the jury returned a verdict similar to the one in question, and therefore the contention of the petitioner that the verdict of the jury must specifically show that the malice alleged in the declaration is proved is without merit. It is clear that the charge contained in this count would not authorize a verdict for the plaintiff for mere negligence. The only real question in the case, in our judgment, is, was malice the gist of the action charged in the single count of the declaration? We are satisfied that that question must be answered in the affirmative. (See Kaplan v. Williams, 245 Ill. App. 542, 546.) In that case, decided by this branch of the Appellate Court, a number of authorities are given defining the meaning of the word "wantonly," and it is unnecessary for us to here repeat what is there said. See also the recent case of Fromm v. Seyler, Idem., 392, 398, wherein the court holds that wantonness implies wilfulness. In the instant case the count in question charges a tort amounting to an assault to commit a bodily injury and the plaintiff could only recover by proving that the defendant, when danger was imminent, knowingly and wantonly drove his automobile against the plaintiff.

In our judgment the County Court erred in ordering Majewski released from custody and therefore the order of that court is reversed and the cause is remanded with directions that he be returned to the custody of the sheriff.

REVERSED AND REMANDED WITH DIRECTIONS.

Barnes, P. J., and Gridley, J., concur.

32536

249 I.A. 641⁴

PEOPLE OF THE STATE OF ILLINOIS,
ex rel. SARAH TEPPER,
Defendant in Error,

vs.

JACK TEPPER,
Plaintiff in Error.

WRIT TO MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

An information was filed in the Municipal Court of Chicago by the State's Attorney of Cook County against Jack Tepper, plaintiff in error, charging that he had unlawfully, wilfully and without reasonable cause neglected and refused to provide for the support and maintenance of his lawful wife, Sarah Tepper, she being then and there in destitute and necessitous circumstances. The plaintiff entered a plea of not guilty and elected to waive a trial by jury, and the cause was submitted to the court. After evidence heard the trial court found the defendant guilty and entered a judgment "that the defendant pay to the clerk of the court for the use of the wife the sum of ten dollars on Saturday of each week for a year, first payment December 24, 1927." The defendant has prosecuted this writ of error.

The defendant raises several contentions, but they all amount to this, that the State failed to prove its case beyond a reasonable doubt. A reviewing court will not reverse a judgment of conviction on the ground that the evidence is insufficient to convict unless the verdict is palpably contrary to the weight of the evidence (People v. Burbaum, 306 Ill. 518, 527.) The finding of a court as to the facts in a case, where it is tried without a jury, is entitled to the same weight as the verdict of a jury. The People made out a prima facie case against the defendant and the trial court saw and

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heard the witnesses and had a much better opportunity than we to pass upon their credibility and the weight that should be attached to their testimony. After a careful consideration of the entire evidence, we are satisfied that we would not be justified in holding that the finding of the trial court was not warranted under all the facts and circumstances in evidence. The following facts are not controverted: The defendant, twenty-four years old, married the prosecuting witness, aged forty years, lived at her home for about two months, and in that time obtained from her practically all the savings she had in a bank. Then came the separation and the defendant has since refused to contribute anything to the support of his wife, although he has an income of approximately \$170 per month that he earns solely through the use of a taxicab that he purchased with money that he obtained from his wife. He now seeks to reverse an order that he pay his wife for one year a moderate sum per week. When the controverted facts in the case are considered in the light of the uncontroverted facts, no other conclusion can reasonably be reached than that the defendant is guilty of the offense charged.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.

During the afternoon and had a short period of opportunity when we in
 gave them their breakfast and the night that should be observed
 in their testimony. After a short conversation at the table
 evidence, we are satisfied that we should not be justified in holding
 that the finding of the trial court was not warranted under all the
 facts and circumstances in evidence. The following facts are not
 controverted: The defendant, twenty-four years old, married the
 complainant, about 1917, lived at her home for some
 two months, and in that time obtained from her husband all the
 money she had in a bank. From time to time she was the
 defendant and since then at various periods in the summer
 of 1918, although he was in prison at approximately 5100 pay
 ment, that he never really returned the money. It is shown that he
 continued with money that he obtained from the trial, he was seen
 at various places, that he was seen at the bank and at various
 other places. When the complainant came in the case she could
 not in the trial of the defendant's wife, in other words
 and possibly be shown that the defendant is guilty of the
 offense charged.

The finding of the Judicial Board of Chicago is

affirmed.

Reversed, 7. 7, and stayed, 7. 7, affirmed.

249 P.A. 641⁵

436 - 32377

HUNT BROTHERS PACKING CO.,

Appellee,

vs.

MAX UDELOWISH, doing business as
Standard Grocery Co.,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed June 20, 1928

per J. J. [unclear]
MR. JUSTICE HOLDEN DELIVERED THE OPINION OF
THE COURT.

This is an appeal by defendant from a judgment rendered against him on a verdict of the jury for \$1122.11.

The cause was tried upon the third amended statement of claim, which inter alia sets forth that on June 10, 1920, the parties entered into a contract by which defendant purchased from plaintiff 800 dozen first size standard grade peaches, 300 dozen 2 $\frac{1}{2}$ size choice grade peaches and 100 dozen 2 $\frac{1}{2}$ size choice grade peaches; that on August 12, 1920, 75 cases of the first size peaches were shipped to and accepted by and paid for by the defendant; that on August 25, 1920, defendant requested plaintiff to hold the balance of the contract for December 1920 delivery; that plaintiff at all times was willing and ready to deliver the peaches to defendant, and did on December 29, 1920 draw its draft on defendant for \$2249.37, the balance then due for the remainder of the order, which defendant refused

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4. 2000 年 10 月 1 日起, 凡在我国境内销售货物的单位和个人, 均应按销售额和规定的税率计算应纳税额, 并向购买方开具专用发票, 在专用发票上注明应纳增值税税额。销售货物的一方称为纳税人, 购买货物的一方称为扣缴义务人。

1992

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2000

Opinion filed June 30, 1938

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1992-1993

Other factors include the following:

It is also possible that the results are due to the fact that the study was conducted in a hospital setting, where patients may be more likely to report symptoms.

... ..

UNITED STATES DEPARTMENT OF AGRICULTURE

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"The world needs the Bible, and the Bible needs the world."

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Approved: _____ Date: _____

to pay; that plaintiff sold the fruit in the open market at San Francisco, California, at the then market price, which was \$1132.11 less than the contract price, and which was the amount of damages which plaintiff suffered by defendant's refusal to carry out his contract. Defendant by his affidavit of merits admits the contract, the receipt of and the payment for the 75 cases of peaches thereunder, but denies that he requested plaintiff to hold the balance of the contract for December 1920 delivery, and denies that plaintiff was at all times and within a reasonable time after the execution of said contract willing and able to deliver the peaches set forth in the contract, and denies that the peaches were ever tendered to him or ever shipped from San Francisco, and denies that plaintiff sustained the damages claimed.

The dispute between the parties is confined as to whether defendant requested plaintiff to hold the balance of the peaches for December 1920 delivery. The burden of defendant's contention is that he never requested plaintiff to hold any part of the merchandise described in the contract. It is in evidence that defendant told plaintiff that he could not take the balance of the peaches, nor pay for them; that he did not want them shipped and that he had asked for a cancellation of the balance of the order. It is patent that defendant was liable under his contract, which he did not dispute, to take the peaches. The price was fixed by the contract, and the proper element of damages

was the difference between the contract price and the market price at the time of the sale. There was testimony by deposition taken of witnesses at San Francisco as to the market value of the peaches at the time of their sale, and the evidence showed that there was a fall in the market price of about 30% of the contract price. Whether the conversations between the parties regarding the delivery of the peaches ever took place is immaterial. Defendant was bound by his contract. This is one of the numerous cases which generally arises where there is a sharp decline in the market price of a contracted commodity.

The question of the market price of the peaches at the time of their sale in San Francisco was one of fact for the jury, and an examination of all the evidence leads us to the conclusion that such evidence amply supports the verdict and judgment.

Defendant contends that there is a variance between the statement of claim and evidence. There is no merit in this contention. The action is what the evidence makes it under the Municipal Court Act, and we find no variance between the statement of claim and the evidence admitted in support of it. Donahue v. Wheeling Cold & Fdy. Co., 205 Ill. App. 301.

The statement of claim in the record was sufficient to fully inform the defendant of the nature of the claim. Sher v. Robinson, 295 Ill. 181.

and the difference between the amount paid and the
market price at the time of the sale. There are testi-
monies by inspection from the witnesses of the purchase
as to the value of the goods at the time of
their sale, and the witnesses showed that there was a fall
in the market price of about 10% of the contract price.
There is no discrepancy between the prices appearing
the delivery of the goods every day in the market.
There is no doubt in his mind. This is one of the
witnesses who are generally known as the
other parties in the market price of a commodity.

The question of the market price of the goods
at the time of their sale in the purchase was one of fact
for the jury, and an examination of all the evidence
as to the conditions and such evidence as they saw in the
market and elsewhere.

There is no doubt in his mind that there is a difference be-
tween the amount of value and evidence. There is no
doubt in his mind. The reason is that the evidence
shows it under the market price of the goods and
various between the purchase of value and the evidence
showed in support of it. There is no doubt in his mind
that there is a difference between the market price and the
value of the goods.

The statement of value in the market and evidence
showed in support of it. There is no doubt in his mind
that there is a difference between the market price and the
value of the goods.

It is contended that it was error to admit conversations between the parties. Admissions of defendant were of a substantive character and admissible under the rules of evidence. Grays Harbor Chemical Co. v Turnbull-Joice Lbr. Co. 163 Ill. App. 331. The letter admitted in evidence was written by the brokers of the defendant, through whom the contract was made. If there was an attempt to make a compromise settlement which was not carried out by the parties, that fact would not affect the rights of the parties to the contract. Holly v. Knaup, 45 *Ibid.* 272.

We find no error in the instructions complained of. They were pertinent in informing the jury of the law applicable to the facts in proof.

The evidence as to the market value of the peaches at San Francisco was sufficient to establish the market price, which market price was the basis of the jury's assessment of damages.

Finding no reversible error in the record, the judgment of the Municipal Court is affirmed.

AFFIRMED.

TAYLOR, P.J. AND WILSON, J. Concur.

It is understood that it was never intended that
the provisions of the act should be applied to the
case of a corporation which is not a citizen of the
United States. The act is intended to apply to
citizens of the United States, and the provisions
of the act are not intended to apply to a corporation
which is not a citizen of the United States.

It is also understood that the provisions of the
act are not intended to apply to a corporation
which is not a citizen of the United States.

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act are not intended to apply to a corporation
which is not a citizen of the United States.

249 I.A. 642¹

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HATES A. CLARKE,

Appellant.

v.

ILLINOIS COMMERCIAL MEN'S
ASSOCIATION, a corporation,

Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed June 20, 1928.

Tracy
MR. JUSTICE HOLDON delivered the opinion of the court.

This is an appeal from a judgment of nil capiat and for costs.

Plaintiff held an accident insurance policy of defendant. It seems that plaintiff returned to his home one night with a cold in his neck and face; in an attempt to alleviate the pain plaintiff placed a hot water bottle against his face and neck and laid down; the hot water bottle was wrapped; plaintiff fell asleep and he awoke to find the skin of his face and neck blistered and burned where the hot water bottle had lain against it.

The trial was before the court by agreement and the whole controversy is encompassed within an interpretation of that provision of the policy in suit which reads:

" Whenever any policy holder of this Association in good standing shall, through external, violent and accidental means, and independently of all other causes, receive bodily injuries which shall, independently of all other causes, immediately, wholly and continuously disable him from doing work of any kind or transacting any business, he shall be paid on each policy of

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state

2004年4月 第11卷第2期

Radl, T. 1991.

References

On 11/19/00, 10:11 AM, "D. J. W." wrote:

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Abstract

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of 1990, the 1990s, and the 2000s.

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Feb-Mar: July and months. Schooling. May, November. May, June, July, and Nov.

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the state university is expected to be completed by 1990.

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insurance in good standing and in full force, etc."

There is no controversy on the facts. For a week after the accident recited above plaintiff continued about his usual affairs and business. For approximately a week plaintiff continued his usual duties after the accident to his face and neck. Plaintiff testified "I was on the road then about a week". His wife testified "he worked that week", and Fred H. Clarke, his son, testified that his father "continued to work during that week and on the following Sunday he went to bed."

Under the terms of the policy in order to entitle plaintiff to recover, he must suffer immediate disability following the accidental injury.

Defendant quotes and relies upon two cases, Preferred Masonic Mut. Acci. Assn. of America v. Jones, 60 Ill. App. 106, and Fred Jones v. Continental Casualty Co. 187 ibid. 413. The questions involved in these two cases were in all respects similar to the questions involved in the case at bar.

In the Jones case the provision construed was an indemnity "against loss of time not exceeding 52 consecutive weeks resulting from bodily injuries incurred ***** which shall independent of all other causes immediately, wholly and continuously disable him from transacting any and every kind of business pertaining to his occupation as above stated." The Jones case supra is substantially on all four

with the case at bar. In that case the insured continued to perform his duties as salesman for a space of five days after the injury. The court in its opinion said:

" It is plain that the parties intended to limit those covered by it to a class identified and distinguished by the means, causing and the effects following them as therein described. The latter are so described by the verb 'disable' qualified by the adverbial phrase 'independent of all other causes' and the adverbs 'immediately', 'wholly,' and 'continuously.' These are all terms of essential description and if they respectively indicate different but consistent characteristics of the thing described, they are alike material, and each is so much so that no liberality of construction in favor of the insured will warrant the court in disregarding either. U.S. Accident Association v. Willard, 43 Appellate, 180. The declaration to be good must therefore aver that the plaintiff was not only wholly and continuously disabled by the means alleged independent of all other causes but also 'immediately' so disabled, whatever that may mean, unless it is included in the phrase 'independent of all other causes.' What it does mean as here used and consequently whether it is so included is the question now presented for determination. According to standard lexicographers and the common understanding it has but two meanings - one, indicating the relation of cause and effect as direct and proximate, and the other, the absence of time between two events. Thus Webster defines it generally as 'in an immediate manner.' His third definition of 'immediate' is 'acting with nothing interposed or between or without the intervention of another object as a cause, means, medium or condition; producing its effect by direct agency.' And hence, more specifically defines the adverb as 'without intervention of anything, proximately, directly - opposed to mediately,' which is in substance identical with the idea conveyed by the adverbial phrase quoted. For a cause which produces its effect 'independent of all other causes' produces it by direct agency or proximately. If then the term 'immediately' was used in that sense or had no other meaning, or none as reasonably applicable to this case it might be disregarded as superfluous. But it has another, quite as commonly understood and used which Webster states as 'without interval of time; without delay; instantly.' So also according to Worcester, Worcester v. Worcester, 43 Ill. Page 188. To give it any effect whatever here then in either sense without disregarding the phrase which is its equivalent in the former, it must be held to have been used in the latter. We need to entertain no doubt what the disability alleged was caused directly and approximately because exclusively, by the injury, in order

to hold as matter of law that if there was an interval of five days between them it was not caused without interval of time, without delay or instantly."

And in deciding the contention of plaintiff the court in the case supra continued:

"Attention is called to cases in which the term has been construed to mean within a reasonable or practicable time. From the Am. & Eng. Ency. of law, Vol. IX, Page 931, (Note 3) is cited the remark that 'the word "immediately" although in strictness it excludes all such times, yet to make good the deeds and intents of parties it shall be construed such convenient time as is reasonably required for doing the thing.' These are believed to be cases in which something is to be done by voluntary human agency and instant compliance is necessarily impossible or so impracticable as to forbid the supposition that it was intended, as illustrated by the provision in fire insurance policies requiring the insured to give immediate notice of his loss and the like where some interval of time is necessary to prepare it. Is there any reason for a like construction here? There was no deed or intent of appellee to be made good. He had nothing to do or intend in the premises. The agreement contemplated him as entirely passive. It was not made his part, in any active or voluntary sense to become disabled. He was to be made so without regard to his will by external, violent and accidental means. If not thereby made so immediately - whether by reason of his strength, pluck, nerve or anything else, though another, less strong might have been - his case is not within the agreement."

In Jones v. Continental Casualty Co., supra, the period which intervened between the injury and the disability was two days. It was there held, as in the Jones case, that it could not be said that the insured suffered immediate disability.

Plaintiff cites cases in states foreign to Illinois which hold to the contrary construction, but the Appellate Court cases here cited are appealing to us as stating a correct interpretation construing the language of the policy,

and "Fighting to Defeat the War" and "Fighting to Win the War."

1. 姓名: 王德明 性别: 男 年龄: 45 职业: 教师 籍贯: 山东烟台 民族: 汉族

[illegible]

Figure 1. The effect of the concentration of the monomer on the polymerization of α -methylstyrene initiated by TiCl_4 in CH_2Cl_2 at -78°C for 24 h. The concentration of TiCl_4 was 1.0×10^{-2} mol/L. The concentration of CH_2Cl_2 was 1.0 mol/L. The concentration of α -methylstyrene was 0.05, 0.1, 0.2, 0.3, 0.4, 0.5, 0.6, 0.7, 0.8, 0.9, and 1.0 mol/L.

It would not be surprising if the above mentioned individuals had been in contact with the individuals mentioned in the above mentioned report, as it is the same area, and was the same. It was found that the individuals mentioned in the above mentioned report were the same as the individuals mentioned in the above mentioned report.

1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 26

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and in the absence of any direct decision of the Supreme Court of this state to the contrary we follow the opinions cited in this court.

While in the cases supra the opinions of this court dwell upon the grammatical construction of the limitation words used in the policy, we see no reason for doubting the application of the word immediately as used in the policy in the instant case as meaning at once without any interregnum of time. That is its plain and natural meaning governing the conduct of plaintiff in making and maintaining his claim under the policy in suit. It is our duty to enforce the contract of the parties according to the terms agreed upon by them as appears from the language used in the contract to express such meaning.

The judgment of the Municipal Court is without error and it is therefore affirmed.

AFFIRMED.

TAYLOR, F.J., ^{DISSENTS} AND WILSON, J., CONCURS.

32547

LEONARD AUSLANDER,

Appellee,

vs.

FILLER, WILSON & MCCLELLAND,
a corporation,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO

Opinion filed June 20, 1928.

MR. JUSTICE MOLDEN delivered the opinion of the court.

All the questions in this record before us for review arise upon the pleadings. There was a judgment in favor of plaintiff and against defendant for \$697.02, from which defendant prosecutes this appeal.

On September 23, 1927, plaintiff filed his claim arising on a transaction between the parties in livestock. The plaintiff on July 14, 1927, shipped some livestock to plaintiff, the agreed value of which was alleged to be \$1,648.58, upon which defendant paid \$955.56, leaving a balance due of \$693.02. To this claim defendant interposed an affidavit of merits made by one L. Patter as agent of defendant, in which he swore that defendant had a good defense to the whole of plaintiff's demand, and the affiant for the defendant in such affidavit denies that there was due plaintiff \$693.02, or any other amount claimed by plaintiff's statement of claim; admits the shipment was made July 14, 1927, and that the statement of claim correctly states the amount received for the shipment and the amount transmitted to plain-

tiff, and then avers that plaintiff is indebted to defendant in the sum of \$687.02, on account of one promissory note given under date of October 12, 1927 with interest at 7% for the principal sum of \$518.84, and that said note is due and owing from plaintiff to defendant, which plaintiff has agreed to pay, and "that the said amount is justly due the defendant and that the defendant retained same out of moneys which has come to its hands from the plaintiff herein."

Defendant filed a set-off dated September 26, 1928, in which the deponent L. Patter avers that he is the agent of defendant, has knowledge, etc. of the facts, and that "he verily believes that said defendant's set-off is a good defense to this suit, upon the merits, to the whole of the plaintiff's demand," and then states that the set-off is as follows: For \$687.02 due and owing for moneys advanced to the plaintiff on October 12, 1927, for the principal sum of \$518.84, with interest at 7% from that date pursuant to a note given by plaintiff to defendant in the following words and figures, and the note is signed Louis Auslander and not Leonard Auslander, the plaintiff.

On motion of plaintiff defendant's affidavit of merits and set-off was stricken from the files, and defendant defaulted for want of an affidavit of merits and a judgment entered on that date for \$687.02 against defendant, with costs, from which judgment defendant prayed an appeal to this court but never perfected that appeal.

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On October 27, 1927, defendant moved to set aside the judgment of October 7, 1927, and in support of his motion proffered an affidavit offering to file an amended affidavit of merits and amended set-off, and the court after hearing the arguments of the respective counsel denied that motion, on the ground that the affidavit did not state a meritorious defense and that the set-off was not between the parties. Thereupon defendant withdrew the affidavit of merits and set-off. On October 28, 1927, defendant again moved to set aside the judgment and tendered an affidavit of merits, which set forth that the plaintiff was the son and agent of one Louis Auslander; that said Louis Auslander owed the defendant \$222.02 on a certain judgment note, and that the shipment made by plaintiff really belonged to Louis Auslander, and defendant included a further amended set-off claiming against plaintiff on account of the execution and delivery to defendant of a note by Louis Auslander, the father of plaintiff, which motion the court overruled, and denied defendant leave to file the last mentioned affidavit of merits and set-off, from which order defendant prayed and perfected the appeal now before the court.

It is further set forth in the bill of exceptions that from and after September 22, 1927, there was in force in the Municipal Court of Chicago certain rules, duly authorized on the last mentioned date, Rule 20 being as follows:

On October 27, 1937, defendant moved to set aside

the judgment of October 7, 1937, and in support of his mo-

tion presented an affidavit showing in this as amended

affidavit he stated that he was not the father of the

plaintiff and requested that the court set aside the

judgment, and the court granted the motion and set aside

the judgment of October 7, 1937, and the court ordered

that the case be set for trial on the merits at the

next term of court, to-wit: the first term of 1938.

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the judgment of October 7, 1937, and in support of his mo-

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that the case be set for trial on the merits at the

next term of court, to-wit: the first term of 1938.

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tion presented an affidavit showing in this as amended

affidavit he stated that he was not the father of the

plaintiff and requested that the court set aside the

judgment, and the court granted the motion and set aside

the judgment of October 7, 1937, and the court ordered

that the case be set for trial on the merits at the

next term of court, to-wit: the first term of 1938.

Witness my hand and seal of office this 27th day of October, 1937.

"No demurrer shall be allowed, but the court may, on motion, order any pleading to be stricken out on the ground that it is insufficient in law or does not comply with the rule of this court, or the court may order a more specific or amended pleading to be filed.

If it appears that the party filing a pleading is relying on a cause of action or defense that is clearly unfounded in law, the court may order the same stricken out and the action to be dismissed or judgment to be entered accordingly as may be just."

The trial judge acted under authority of Rule 30, aforesaid, allowed the motion and struck the affidavit of defense and set-off from the files. The court had no alternative, but to allow the motion, for it is patent that the note of Louis Auslander alleged to be the father of the plaintiff, was not by any affidavit of veritate shown to be proper to be set off against the claim of plaintiff. This seems to be too simple for further discussion.

This appeal does not involve the judgment of October 7, 1927, but the order of October 28, 1927, denying defendant's motion to vacate the judgment of October 7, 1927. It is contended for defendant that in denying that motion the trial court abused its discretionary power. It was a matter for the trial judge to pass upon the question whether sufficient reason had been shown why that judgment should be set aside. An affidavit alleging the indebtedness of a stranger to the suit as a set-off was no defense. The action of the trial judge will not be disturbed on review unless it is clear that the trial court abused its discretion in denying the motion to vacate the judgment. Admitting the truth of the statements regarding the set-off resting in the note of a stranger to the suit, it is patent that no legal defense

[illegible][illegible]

was stated in such affidavit. There was no averment in the affidavit, upon which the action was based, setting forth any reason why the defense then sought to be interposed was not interposed before the judgment was entered. Brunswick v. McDonnell, 101 Ill. App. 533; Opperman v. Conway, 117 ibid. 584.

The action of the trial court was challenged for its refusal to set aside default judgments and in the foregoing cases it was held that the court would not interfere unless it appeared from the record that in refusing to vacate the judgment the trial court abused his judicial discretion. These cases are equally applicable to the facts in the record before us.

For the foregoing reasons the order of October 28, 1927, denying defendant's motion to set aside the judgment of October 7, 1927, being without error, is affirmed.

AFFIRMED.

TAYLOR, P.J., and WILSON, J., CONCUR.

was stated in such a manner. There was no attempt in
the affidavit, however, to state the nature of the
facts and circumstances which were alleged to be
connected with the alleged offense. The affidavit was
signed by J. J. [illegible] and J. J. [illegible].

Given at the City of [illegible] this [illegible] day of [illegible] 19[illegible].

The office of the [illegible] court was notified
that the [illegible] to set aside the judgment was in the
foregoing cases it was held that the court would not
set aside the judgment in cases where the [illegible]
to reverse the judgment the trial court should be [illegible]
[illegible]. There were no [illegible] [illegible] in the
facts in the record before us.

The [illegible] [illegible] [illegible] [illegible] [illegible]
[illegible] [illegible] [illegible] [illegible] [illegible]
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249 I.A. 642³

33552

MIKE RIMANICH,

Appellee,

vs.

JACK MILLER,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed June 20, 1928.

MR. JUSTICE HOLLOM DELIVERED THE OPINION OF THE
COURT.

This action was brought by plaintiff against defendant on a claim that he loaned the defendant the sum of \$470.00 in installments; on January 20, 1925 he loaned him \$100.00, on March 10, 1925 \$100.00, on May 15, 1925 \$50.00, on June 21, 1925 \$50.00, on July 28, 1925 \$30.00, on February 24, 1926 \$100.00, on March 15, 1926 \$25.00, and on April 10, 1926 \$5.00. In the month of June, 1926, defendant paid \$70.00 on account, thus leaving a balance of \$400.00.

Defendant denied the loans and put in a counter-claim for \$498.00 for the use of his automobile.

There was a hearing before the court without a jury with a finding in favor of plaintiff for the sum of \$400.00, and a judgment on that finding. Defendant argues for reversal that the finding and judgment are against the weight of the evidence.

It seems that the parties to this suit are cousins and that defendant and his plaintiff cousin often times went riding in the automobile of defendant, both of them being

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Opinion filed June 30, 1928.

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single and each being accompanied by a young woman.

We have read all the evidence and conclude with the trial judge that the plaintiff maintained his theory of the case that he loaned at the various times above stated to the defendant the sum of \$470.00, and that defendant paid on account thereof the sum of \$70.00, leaving the amount of the finding and judgment still due at the time of the trial. The counter-claim of the defendant he failed to prove. He did not claim there was a contract or agreement on the part of his plaintiff cousin to pay fare for riding with him in his automobile at any of the times in question and no attempt was made to prove what would be a reasonable fare for such rides. It is patent that they were cousins and that they were out in defendant's automobile riding with their respective women friends for pleasure. At the time the money was loaned the defendant was out of work, and the learned trial judge may have concluded that was the reason for his need for borrowing money from the plaintiff.

We cannot say that the finding is against the preponderance of the evidence. On the contrary, as it appears in the record, we are in accord with the trial judge in finding that from the preponderance of the evidence the plaintiff maintained his cause of action. The defense seemed to lack both merits and sincerity, and none of the elements of counter-claim were proven by competent evidence. The trial judge saw the witnesses and thereby was able to judge of their credibility and to give credit accordingly.

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single and each being accompanied by a young woman.

He gave back all the evidence and documents with the

trial judge that the plaintiff retained the money of the
case that he found of the various items shown to the
defendant the sum of \$100.00, and that defendant was an ac-

countant thereof the sum of \$100.00, leaving the amount of the
finding and judgment still due at the time of the trial. The
counter-claim of the defendant he failed to prove. He did not

show there was a contract or agreement on the part of his
plaintiff to make to pay from the money with him in his ac-

countant as any of the items in question and no account was made
of items that would be a contract with him and himself. It
is found that they were common and that they were not in

defendant's possession. It was found that they were common and
defendant was not at fault and the finding still held and was
explained that was the reason for his need for returning money

from the plaintiff.

It is found that the finding is against the plaintiff
and defendant of the evidence. In the majority, as it appears in
the record, as it is found that the trial judge is finding

that from the presentation of the evidence the plaintiff was
found to be at fault. The finding is found to be
evidence and evidence, and none of the elements of counter-claim

were proven by defendant's evidence. The trial judge was the
elementary and elementary and also in light of that evidence
and he gave credit accordingly.

- 2 -

We see no reason for disturbing his conclusions and findings and therefore the judgment of the Municipal Court is affirmed.

AFFIRMED.

TAYLOR , P.J., AND WILSON, J., CONCUR.

THE FOLLOWING IS A SUMMARY OF THE RESULTS OF THE

EXPERIMENTS CONDUCTED AT THE UNIVERSITY OF

CHICAGO

RESULTS

THE FOLLOWING TABLES SHOW THE RESULTS OF THE

249 I A 642⁴

32581

S. E. BASINSKI,

Appellee,

vs.

JULIUS WILICZKO,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed June 20, 1928.

Preceding
MR. JUSTICE HOLDEN delivered the opinion of
the court.

This is an appeal by defendant from a judgment rendered against him in favor of plaintiff on the verdict of a jury for the sum of One Thousand Dollars.

Plaintiff claims the amount of the judgment was a real estate commission earned by him in procuring one Joseph Rube to purchase defendant's property at 2419 West Marquette Road, Chicago. The transaction was arranged by a salesman of plaintiff, Edmund Witkowski. While defendant denies in his affidavit of merits the making of the contract, the preponderance of the evidence demonstrates that Edmund Witkowski, the salesman of the plaintiff, was authorized by defendant to procure a purchaser for the above described real estate for the sum of \$25,000; that he agreed to pay the usual broker's commission if he did find a purchaser, which commission amounts to \$1,000. It is in evidence that

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and 2.5 mmol/L, respectively.

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Opinion filed June 30, 1958.

Be notified and have your account setup in time. 20

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This is an appeal by defendant from the judgment rendered against him in favor of plaintiff on the second day of June last for the sum of one thousand dollars.

now recommended and to be followed with entire strictness

and giving him a full state of mind as to the situation of the country at this time.

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

Investigating officer, [redacted] advised that he was unable to determine a

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the presence of the evidence in the

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THE NATIONAL ARCHIVES COLLEGE PARK, MARYLAND

1.32 $\log_{10} 100 = 2$ and $\log_{10} 10 = 1$ so $\log_{10} 1000 = 3$ and $\log_{10} 10000 = 4$.

defendant and his wife executed a warranty deed to Joseph Tuba and Mary Tuba, his wife, dated the 17th day of July, 1935, in which the property known as No. 2419 West Marquette Road, was by its legal description conveyed.

The evidence is conflicting, but from a careful examination of the evidence in the record we think the jury might properly find that the sale was negotiated by Witkowski, the salesman of the plaintiff, and that he was authorized so to do by defendant, and that defendant agreed to pay the commission as stated. The court overruled defendant's motion for a new trial and in so doing gave his judicial concurrence to the jury's verdict.

Defendant argues for reversal that the verdict is contrary to the weight of the evidence, - in this we cannot concur, - and also that the evidence shows that one J. Hanson, a real estate broker, negotiated the sale. In this contention we are unable to concur.

Defendant likewise complains of certain instructions which the court gave to the jury. A careful examination of these instructions leads us to the conclusion that they stated the law applicable to the facts shown by the proofs.

We find no error in the record warranting a reversal of the judgment of the Municipal Court, and it is therefore affirmed.

AFFIRMED

TAYLOR, F.J. AND WILSON, J., CONCUR.

Delaware and his wife executed a warranty deed to land
here and my wife, his wife, dated the 17th day of July,
1936, in which the property known as No. 2112 East Main
Street, Wash., was by the legal description mentioned.

The evidence is overwhelming, but from a careful

examination of the evidence in the record we think the
jury might properly find that the sale was negotiated by
himself, the witness at the hearing, and that he was
entitled to be so by testimony, and that Deland agreed
to pay the commission as stated. The court overruled the
Deland's motion for a new trial and in so doing gave the
Deland's commission to the jury's verdict.

Deland's agent for testimony that the verdict is
entirely to the right of the evidence - in this we cannot
complain - and also that the evidence shows that he is, indeed,
a well known person, and that he is, in this case,
that we are bound to conclude.

Deland's motion for reversal of verdict is
frivolous and the court gave to the jury. A careful examina-
tion of these instructions leads us to the conclusion that
they stated the law applicable to the facts shown by the

evidence.

We find no error in the record - reversing a por-
tion of the judgment of the District Court, and it is

Reversed and affirmed.

REVEREND

JOHN, V. L. AND WILLIAM, L. JAMES.

249 I.A. 643¹

21976

WILL LIGHTNING,

Defendant in Error,

vs.

JOSEPH LABODA, alias Frank Laboda
and AGNIESKA LABODA,

Plaintiffs in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

Opinion filed June 20, 1928.

MR. ~~PREVIOUS~~ JUSTICE TAYLOR delivered the opinion
of the court.

On May 22, 1925, Will Lightning, the plaintiff, began a suit of trespass on the case, in the Municipal Court, against Joseph Laboda and Agnieska Laboda, the defendants, claiming that he had suffered damages to the extent of \$2600.00, as the result of certain misrepresentations and misconduct of the defendants. There was a trial before the court, with a jury, and a judgment in favor of the plaintiff, and against the defendants, in the sum of \$2600.00. The matter comes before us for review upon a writ of error sued out by the defendant, Agnieska Laboda.

The plaintiff alleged in his statement of claim that on June 1, 1924, he paid to the defendants \$2100.00, for the purchase of certain real estate known as 240 Sedgwick Street, Chicago; that they gave him what he was led to believe was a valid receipt for that sum, although it was not signed; that he received nothing of value for the sum so paid; that

2491A.643

1938

WILLIAM L. BROWN, JR.
Plaintiff in Error
vs.
UNITED STATES, et al.
Defendants in Error

Opinion filed June 30, 1938.

of the court.

On May 24, 1938, will appearing, the plaintiff
began a suit of trespass on the land, in the National Forest,
against Joseph L. Brown and Lillian L. Brown, the defendants,
alleging that he had written checks to the extent of
\$2500.00, as the result of certain misrepresentations and
statements of the defendants. There was a trial before the
court, with a jury, and a judgment in favor of the plaintiff,
and against the defendants, in the sum of \$2500.00. The
matter came before us for review upon a writ of certiorari
granted by the Supreme Court, and we have heard the case.

The plaintiff alleged in his statement of claim
that on June 1, 1934, he paid to the defendants \$2500.00, for
the purchase of certain real estate known as the Redwood
Forest, which they gave him and he was led to believe
was a valid receipt for that sum, although it was not signed;
that he received nothing of value for the sum so paid; that

the defendants caused him to be dispossessed from the premises at great expense, inconvenience and suffering; that, in regard to the transaction and the alleged sale, they knowingly made misrepresentations to him, upon which he relied, and that they did so with intent to defraud him, and that as a result he was defrauded.

The defendants filed an affidavit of merits, and denied practically all the material allegations of the plaintiff's statement of claim, denying, among other things, that the plaintiff paid to them, or either of them, the sum of \$2100.00, or any other sum whatsoever, to apply on the purchase of the premises in question. Further, they alleged that the plaintiff was a tenant in the basement flat of the premises situated at 840 Sedgwick street; that he moved into the premises on or about April 1, 1934; that he paid to Joseph Laboda, as agent, the sum of \$30.00 for the rent for the month of April, for the basement flat; that he collected certain of the rents from the other tenants in the premises without authority from the owners thereof; that thereafter forcible entry and detainer proceedings were instituted against the plaintiff and certain other tenants, resulting in favor of the plaintiff in those cases.

The evidence introduced by the plaintiff tended to show that from April to July, 1934, he lived in the basement flat at 840 Sedgwick Street; that he rented the premises from Frank Laboda, for \$30.00 per month; that during the month of

The defendant accused him to be disseminated from the premises at great expense, inconvenience and suffering; that, in regard to the transaction and the alleged sale, they knowingly made misrepresentations to him, upon which he relied, and that they did so with intent to defraud him, and that as a result he was defrauded.

The defendant filed an affidavit of service, and denied practically all the material allegations of the plaintiff's statement of claim, denying, among other things, that the plaintiff paid to them, or either of them, the sum of \$100.00, or any other sum whatever, as a gift or on the purchase of the premises in question. Further, they alleged that the plaintiff was a tenant in the basement flat of the premises situated at 240 Sedgwick Street; that he moved into the premises on or about April 1, 1924; that he paid to Joseph Laboda, an agent, the sum of \$10.00 for the rent for the month of April, for the basement flat; that he collected certain of the rents from the other tenants in the premises without authority from the owners thereof; that threatened forcible entry and detainer proceedings were instituted against the plaintiff and against other tenants, resulting in the loss of the plaintiff in these cases.

The evidence introduced by the plaintiff tended to show that from April to July, 1924, he lived in the basement flat at 240 Sedgwick Street, that he rented the premises from Frank Laboda, for \$10.00 per month; that during the month of

May, he had a conversation with Laboda about buying the premises, and on June 1, 1974, in Laboda's home, he gave Laboda \$2100.00 in currency, which he counted out on the table, and which the defendant, Mrs. Laboda, recounted and put in her apron and took away to another room; that Joseph Laboda gave Lightning a written receipt for the money, which receipt he afterwards withdrew and replaced with a typewritten one; that Joseph Laboda gave Lightning a list of the tenants, and with Lightning called on the tenants and told them that Lightning was the new landlord; that Lightning did some repair work on the premises and had some plumbing done; that in the course of the second month, after that transaction, Lightning had some trouble about collecting the rent from the tenants, and demanded his money back from Laboda; that Lightning then had Laboda arrested, and he, himself, shortly afterward was served with a five-day notice to vacate the premises; that at a hearing in the Renters' Court, Laboda said that he was only the agent for his son, and that he did not own the property in question.

Lina Ware, a half-sister of the plaintiff, testified that she saw Lightning pay \$2100.00 to Laboda and saw Mrs. Laboda take the money in her apron and go to another room; that several tenants paid rent to Lightning, and that Laboda told the tenants that he was no longer the owner, and that the place had been bought by Lightning.

Agnieszka Laboda, was called by the plaintiff under Rule 33, and testified that Frank Laboda did not own the

Now, he had a conversation with Laboda about buying the property, and on June 1, 1934, in Laboda's name, he gave Laboda \$2500.00 in currency, which he counted out on the table, and which the witness, Mrs. Laboda, remembered and put in her drawer and put away in a drawer near the front of the house. Laboda gave a written receipt for the money, which receipt he afterwards withdrew and replaced with a typewritten one; that Joseph Laboda gave Laboda a list of the tenants, and with Laboda called on the tenants and told them that Laboda was the new landlord; that Laboda told some tenants that he was the new landlord and had some plumbing done; that in the course of the month, after that time, Laboda called on the tenants and collected the rent from the tenants, and demanded his money back from Laboda; that Laboda then had Laboda arrested, and he, himself, went to the police with a five-day notice to vacate the premises; that as a result in the Renters' Court, Laboda said that he was only the agent for his son, and that he did not own the property in question.

Now, the witness, Mrs. Laboda, testified that she was giving up \$2500.00 to Laboda and was that Laboda told the money in that name and go to another room; that money was paid him in Laboda's name, and that Laboda told the tenants that he was no longer the owner, and that the money had been bought by Laboda.

Laboda, Laboda, was called by the witness, Mrs. Laboda, and testified that Frank Laboda did not own the

property at 940 Sedgwick street, but that she owned it and never sold it to Lightning or anybody else. In her own behalf she testified that the plaintiff never gave her any money, or that she ever sold the property in question to him; and denied that she told her husband to sell the property, and denied that she ever received any money on account of such sale,

There was offered in evidence a deed, dated April 14, 1918, conveying the property in question to Frank and Agnieszka Laboda, as joint tenants, and, also, a quit-claim deed, dated April 21, 1918, for the property in question, from Frank Laboda to Agnieszka Laboda.

For the plaintiff, Edward J. Dodd, a deputy state fire marshall, testified that on September 4, 1904, he went to the property in question to investigate a fire; that he inquired for the owner, and Laboda stated that he was the owner; that he had a conversation with Lightning and Laboda, and Laboda said Lightning was the owner, and had paid him \$2100.00 for the property, and that there remained \$3500.00 of the purchase price to be paid; that Lightning told him how he had saved the money, and where he had kept it; that Laboda had given him a written receipt for the money, but had taken it from him and substituted one made out on the typewriter, which he showed to Dodd; that he subpoenaed Lightning and Laboda to his office, and under oath Laboda denied what he had told him in a previous conversation, whereas, Lightning stated substantially the same as he did in his previous conversation.

There is no doubt but that the evidence quite

property of 543 Michigan Street, but that she owned it and never
advised her husband to acquire it. In fact she never
testified that the plaintiff never gave her any money, or that
she ever sold the property in question to him; and stated that
she told her husband to sell the property, and testified that she
never received any money on account of such sale.

There was offered in evidence a deed, dated April
14, 1918, conveying the property in question to Louis and
Agnes Laboda, as joint tenants, and, also, a quitclaim deed,
dated April 11, 1918, for the property in question, from Frank
Laboda to Agnes Laboda.

For the plaintiff, Edward A. Ladd, a deputy state law
marshal, testified that on September 4, 1904, he went to the
property in question to investigate a fire; that he inspected the
premises, and Laboda stated that he was the owner; that he had
a conversation with Lightning and Laboda, and Laboda said that
he was the owner, and had paid him \$1500.00 for the property,
and that there remained \$1500.00 of the purchase price to be
paid; that Lightning told him how he had secured the money, and
that he had kept it; that Laboda had given him a written re-
ceipt for the money, but had taken it from him and substituted
one made out on the typewriter, which he showed to him; that
he subsequently lighting and Laboda to his attorney and under
oath Laboda denied what he had told him in a previous conver-
sation, whereon, Lightning stated substantially the same as he
did in his previous conversation.

There is no doubt but that the evidence tends

overwhelmingly shows that the defendants took advantage of the plaintiff, who relied upon their representations, and defrauded him of the sum of \$2100.00.

To reverse the judgment, the only claim made on behalf of the defendant, Agnieszka Laboda, is misconduct on the part of the trial judge during the progress of the trial. Counsel for the defendant urges that when the plaintiff testified that Lina Wore gave the tenants a receipt for their rent, on account of inability to write, and it was objected to as being hearsay, the Court said, "Why, it isn't hearsay at all. He is telling a straight-forward story;" that later after plaintiff's counsel had warned the witness not to say what he thought at any time, but to tell what was said and done, the Court said, "He is getting along very well. Let counsel object. Go ahead, Mr. Lightning." Although the two characterizations of the words used by the Court had better been left unsaid, we do not feel that they constitute substantial error.

Objection on the part of the defendant is made to the following colloquy between the Court and counsel:

"Mr. Hammond: State whether you put in any time trying to collect back the \$2100.00.

Mr. Malley: I object.

The Court: Let him answer, and then you can move to strike it out.

Mr. Malley: After he answers the damage is done. It is not corrected by any order to strike out. If it is not proper at this stage I am not getting the advantage of my objection, by striking it out after it is answered.

The Court: You may answer what effort you made to get back your (\$2100.00)."

overwhelmingly more than the balance from which it
the plaintiff, who relied upon their representations, and
deducted him of the sum of \$100,000.

To reverse the judgment, the only way was on
behalf of the defendant, against whom, in accordance with

the fact of the trial judge being the witness at the
trial. However, for the defendant to win the trial

the plaintiff must show that the balance was not
his own, as a result of dealing in stock, and he was not

liable to be held liable, the court said, "Why, it is
history as well. He is telling a straight-forward story."

That later after plaintiff's counsel had examined the witness
not to say that he showed at any time, but he told that was

said and done, the court said, "He is telling a story very
well. Let counsel object. On cross, Mr. Plaintiff, through

the two observations of the court made by the court had
before been left unexamined, we do not find that they were

materially true.

Question on the part of the defendant in which to
the following testimony between the court and counsel:

"Mr. Defendant: What other way was there than trying
to collect from the \$100,000."

Mr. Plaintiff: I object.
The court: Let him answer, and then you can move
to strike it out.

Mr. Plaintiff: After he answers the answer is struck. It
is not supported by any other evidence. It is in
not proper at this stage. I am not getting the substance
of my objection, by stating it out when it is answered.

The court: You may answer what effect you wish to
get from your \$100,000."

It is true that the payment of the \$2100.00 was one of the questions involved and was for the jury to pass upon; still, inasmuch as the evidence is quite overwhelmingly that the \$2100.00 was actually paid by the plaintiff, we hold that the criticism of what the Court there said, " You may answer what effort you made to get back your \$2100.00," does not constitute substantial error.

A number of other colloquies between the Court and counsel, and witnesses, have been called to our attention by counsel for the defendants. We have examined all of them. It is true that they give rise to some criticism, and show that the trial judge did not exercise proper care in passing upon questions, and in making statements before the jury. We cannot resist the conclusion, however, that in view of what the evidence shows, none of the errors to which our attention is called, nor all of them taken together, would justify a reversal of the judgment.

The judgment, therefore, will be affirmed.

AFFIRMED.

HOLDOM AND WILSON, JJ. CONCUR.

It is true that the payment of the \$100.00 was one
of the conditions attached to the fact that the
bill, inasmuch as the evidence is quite overwhelmingly that
the \$100.00 was actually paid by the plaintiff, as held in
the opinion of the court in the case, "You may accept
that effect for which you have paid \$100.00," that the
defendant's obligation is extinguished.

A matter of great importance between the court and
counsel, and likewise, the fact being as set forth by
counsel for the defendant, he has received all of the
is it true that the fact is now decided, and that
that the fact is now decided, and that the fact is now
now decided, and is being decided by the court, and
counsel states the conclusion, however, that it is now
the evidence shows, none of the other is with any intention
is called, and all of them have been decided, and that
recovery of the judgment.

The judgment, therefore, will be affirmed.

ATTORNEY

WILLIAM H. HARRIS, JR.

422 - 32363

FERGUSON COAL COMPANY,

Appellee,

vs.

HARRY VEHON and ARGYLE BUILDING
CORPORATION, a Corporation,

Appellants.

Appeal from

Municipal Court

of Chicago.

Opinion filed June 20, 1928.

MR. PRESIDING JUSTICE TAYLOR delivered the
opinion of the Court.

This was an action of the Fourth Class in the
Municipal Court by the plaintiff, Ferguson Coal Company
against the defendants Harry Vehon and Argyle Building
Corporation, for \$251.16 for certain coal alleged to have
been sold by the plaintiff to the defendants. There was
a trial before the court without a jury, and a judgment in
favor of the plaintiff for \$251.16. This appeal is
therefrom.

In the brief for the defendants, the only points
made are that the plaintiff must prove what is alleged in
the declaration; prove the liability of the defendants;
and that "the issue must be determined from the evidence."
The only points argued, however, are that neither Vehon nor
the Argyle Building Corporation ever ordered or agreed to
pay for any coal delivered by the plaintiff, and that the
plaintiff failed to prove that the corporation received the
amount of coal mentioned in the statement of claim.

2401A-048

482 - 21121

Appointed,	Appointed,
W. J.	W. J.
HARRY VERNON and ANNE E. BELLING	HARRY VERNON and ANNE E. BELLING
CONVICTS, a Corporation,	CONVICTS, a Corporation,
Washington	Washington

Opinion filed June 20, 1938.

BY THE COURT: Justice William J. Brennan

Opinion of the Court.

This was an action of the Court in the
Municipal Court by the plaintiff, William J. Brennan,
against the defendant, Harry Vernon and Anne E. Belling.
The plaintiff sought to recover the sum of \$100.00
plus costs. The defendant denied the plaintiff's claim
and sought to recover the sum of \$100.00 plus costs.
The plaintiff introduced evidence to prove that the
defendant had received the sum of \$100.00 from the
plaintiff. The defendant introduced evidence to prove
that the plaintiff had received the sum of \$100.00 from
the defendant. The Court found in favor of the
plaintiff and awarded the sum of \$100.00 plus costs.

Justice

In the first of the judgments, the only points
made are that the plaintiff was not in default in
the defendant; hence the finding of the defendant;
and that the sum of \$100.00 was received from the defendant.
The only points argued, however, are that neither party
has the burden of proof. The plaintiff introduced evidence
to prove that the defendant had received the sum of
\$100.00 from the plaintiff. The defendant introduced
evidence to prove that the plaintiff had received the
sum of \$100.00 from the defendant. The Court found in
favor of the plaintiff and awarded the sum of \$100.00
plus costs.

In view of what the record contains, we have difficulty in understanding just why this appeal was taken.

Lawrence W. Ferguson, a witness for the plaintiff, President of the Ferguson Coal Company, the plaintiff, testified that he met Vehon, the defendant, in February, 1936, at his, Ferguson's, bank, of which bank, he, Ferguson, was president, and had several talks with him with reference to buying coal; that he talked with him about the coal, off and on, from February to November, 1936; that Vehon told him that, after many months of effort, he had succeeded in getting rid of certain interests that had handicapped the progress of the building; that he had personally taken charge of it, and that he, Ferguson, need not worry about the payment of the coal bills from that time on, as he, Vehon, personally would see that they were taken care of; that the conversation took place in February, 1936.

Upon this being testified to at the trial, counsel for the defendants said, " I am not going to contest the delivery of the coal. I can imagine the witness delivering all the coal personally."

Ferguson further testified that he had a conversation with Vehon the latter part of May, 1936, at his, Ferguson's, bank; that he told Vehon that the plaintiff would be unable to make further deliveries on a credit basis; that Vehon said all future deliveries would be

in view of what the record contained, we have
difficultly in understanding just why this special was
made.

Statement of Foreman, a witness for the
plaintiff, president of the Foreman Coal Company, the
plaintiff, testified that he had been, the defendant,
in February, 1900, at Rio, Foreman's, bank, at which
bank he, Foreman, was president, and had several deals
with his wife's interest in buying coal; that he talked
with the bank the coal, at Rio, from February to
November, 1900; that when told the fact, after many months
of effort, he had succeeded in getting rid of certain
interests that had been made the subject of the building;
that he had personally taken charge of it, and that he,
Foreman, had not even been the subject of the coal;
that from that time on he, Foreman, personally with
one that they were taken care of; that the conversation
took place in February, 1900.

Upon this point testimony as to the trial,
examined for the defendant said: "I am not going to mention
the delivery of the coal, I am leaving the witness to
diverge all the way personally."

Foreman's testimony testified that he had a man
testimony with whom the witness had at Rio, 1900, as did,
Foreman's, bank; that he did know that the plaintiff
would be made to make further delivery as a credit
bank; that when told all future delivery would be

sent G. O. D., and that he would apply each month's payment on the delinquent account; that he had further talks with Vehon about paying the balance as late as the afternoon preceding the time at which he was testifying; that Vehon said if he, Ferguson, would give him time, he would take care of it. Ferguson further testified that he told Vehon, about the 25th of September, that the plaintiff had not received the check which he, Vehon, had promised to give him on September 15; that Vehon said he would give him at least \$300.00 before the close of the month; that the balance due, and no part of which has been paid, is \$351.16.

One Hawkins, General Manager of the plaintiff, testified that he first met Vehon in February, 1906; that he, Hawkins, was familiar with the Coal Company account which was being sued upon; that certain papers which were shown him at the trial were the ledger sheet of the account of Vehon and the Argyle Building Corporation, which was kept by the bookkeeper Moon; that he, Hawkins, knew about the account; knew that deliveries of coal were made, and knew the amount; that he was present at the conversation between Vehon and Ferguson, at the North Shore Bank, in the month of February; that Vehon told Ferguson that he was taking over the hotel; that Ferguson asked about the payment of the old account of the hotel; that Vehon said to Ferguson that he did not have to worry about the account any longer; that he would personally see that the account was paid in full; that after that, he himself, made

collection calls on several occasions, one being in September, 1926; that on that occasion he talked with Vehon, and asked him when the plaintiff could get a check for the balance due; that Vehon told him that he was negotiating at that time some matters in connection with the hotel; that he expected to pay and take care of them in a very short time; that at that time, the witness presented to Vehon a statement of the bill. On cross-examination he stated that he arrived at the amount of \$251.16, as being the full amount of the coal that was delivered, less the payments made on it; that the ledger showed that there was \$251.16 due.

One Stanley Moon, called for the plaintiff, a bookkeeper for the plaintiff, testified that he knew about the different items that were in the account, and that the balance due was \$251.16; that the entries in the books were made by his assistant, under his personal supervision.

The only witness called on behalf of the defendants was the defendant Harry Vehon. The only testimony which he gave which was in any way substantially contradictory of the case made out by the evidence of the plaintiff, was his personal statement that he personally never ordered any coal from the Ferguson Coal Company, and never promised personally to pay for any.

From the foregoing, it will be readily seen that this Court of review, with the record in the condition it is, would not be justified in overriding the judgment

collecting calls on several occasions, one being in September, 1932; that on that occasion he talked with Vahon, and asked him when the check would get a check for the balance due; that Vahon told him that he was negotiating at that time some papers in connection with the hotel; that he expected to pay and take care of them in a very short time; that at that time, the witness presented to Vahon a statement of the bill. An examination was stated that he returned at the amount of \$251.15, as being the full amount of the bill that was due; that the ledger showed that there was \$251.15 due.

One Henry Vahon, called for the plaintiff, a witness for the plaintiff, testified that he knew about the different items that were in the account, and that the balance due was \$251.15; that the entries in the books were made by his assistant, under his personal supervision. The only witness called on behalf of the defendant was the defendant Henry Vahon. The only testimony which he gave which was in any way substantially contradictory of the case made out by the evidence of the plaintiff, was his personal statement that he personally never entered any cash from the Ferguson Hotel Company, and never provided personally to pay for any. From the foregoing, it will be readily seen that this Court of review, with the record in the case before it, would not be justified in overruling the judgment

-5-

of the trial judge, who saw the witnesses, and, evidently, believed those of the plaintiff.

Finding no error in the record, the judgment will be affirmed.

AFFIRMED.

HOLDOM AND WILSON, JJ. CONCUR.

of the other party, and the witness, and the witness
has been taken by the witness.

It is also to be noted that the witness
will be allowed.

THE COURT

THE COURT: I have heard the evidence of the witness.

THE COURT: I have heard the evidence of the witness.

THE COURT: I have heard the evidence of the witness.

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THE COURT: I have heard the evidence of the witness.

361 - 33302

HARVEY H. MOLLER,

Appellee,

v.

SEARS, ROEBUCK AND COMPANY,
a corporation, and SEARS, ROEBUCK AND
COMPANY OF ILLINOIS, a corporation,

Appellant.

APPEAL FROM

CIRCUIT COURT

OF COOK COUNTY.

Opinion filed June 20, 1928.

MR. JUSTICE WILSON delivered the opinion of the
court.

This was an action for personal injuries sustained by the plaintiff, Harvey H. Moller, by reason of a collision occurring on October 27, 1922, between a motor-cycle upon which he was riding, and a motor truck owned and operated by the defendants, Sears, Roebuck and Company, a corporation, and Sears, Roebuck and Company of Illinois, a corporation. The accident happened at the intersection of Adams Street and Campbell avenue, two intersecting streets in the city of Chicago, about one or two o'clock in the afternoon of the day in question. From the testimony it appears that the motor-cycle was being driven over and along Campbell avenue in a southerly direction, by one George Banks; that the machine was a Harley-Davidson motor-cycle with a leather seat and a luggage carrier on the rear, and it was upon the rear seat that the plaintiff was

249 L. 648

101 - 1111

HARVEY K. MILLER,

Appellee,

v.

WILLIAM H. HARRIS and others,
Appellants,
Company of Illinois, a corporation,
and others, Appellants.

Opinion filed June 20, 1928.

MR. JUSTICE CLARK delivered the opinion of the

court.

This was an action for personal injuries sustained
by the plaintiff, Harvey K. Miller, by reason of a collision
between an automobile owned by the defendant, William H. Harris,
and a motor vehicle which was being driven by one of the
defendants, William H. Harris, and a motor vehicle owned and
operated by the defendant, William H. Harris, and Company, a
corporation, and others, Harris and Company of Illinois, a
corporation. The accident happened at the intersection of
Main Street and Campbell Street, two intersecting streets
in the city of Chicago, about one or two o'clock in the
afternoon of the day in question. From the testimony it
appears that the motor-cycle was being driven over and
along Campbell Street in a southerly direction, by one
of the defendants, William H. Harris, and a light-colored motor-
cycle with a leather seat and a luggage carrier on the
rear, and it was upon the rear end of the plaintiff's car

riding at the time of the accident; that the motor truck was a one ton Nelson-Lemon right hand drive truck; that at the time of the accident the truck was proceeding in an easterly direction on Adams street at from 15 to 20 miles an hour. According to the testimony of Banks, he was driving at about 18 miles an hour as he approached Adams street and was on the right hand side of Campbell avenue, about 8 feet from the curb; that when he was about 15 feet from the north curb of Adams street, apparently near the center and about 50 feet west of Campbell avenue, he was going at about 18 or 20 miles an hour. According to the testimony of this witness, as the two vehicles approached the corner, the driver of the truck signalled for him to go ahead. Just previous to this signal, according to his testimony, Banks had applied the brakes on his motor-cycle for the purpose of slowing down, and upon receiving the signal from the driver of the truck he proceeded to go ahead; but the truck did not slow up and when he saw it was not going to do so, he applied his brakes but was unable to avoid a collision. Banks' testimony is corroborated, in regard to the giving of the signal, by a witness named William Tissen, who testified that he was standing at the southeast corner of the intersection in question at the time of the accident, and noticed the men on the motor cycle and saw the truck about 40 feet from Campbell avenue, going about 20 miles an hour; that he saw the driver of the truck motion with his arm from left to right; that at the time the motor-cycle was travelling at from 8 to 10 miles an hour and the truck was going

riding at the time of the accident; that the motor truck
was a one ton Nelson-Lewis light duty truck; that
at the time of the accident the truck was proceeding in
an easterly direction on Adams Street at about 15 to 20
miles an hour. According to the testimony of Lewis, he
was driving at about 15 miles an hour as he approached
Adams Street and was on the right hand side of Campbell
Street, about 5 feet from the curb; that when he was about
15 feet from the curb on Adams Street, Campbell
Street was about 20 feet wide at Campbell Street,
he was going at about 15 or 20 miles an hour. According
to the testimony of this witness, as the two vehicles ap-
proached the corner, the driver of the truck signalled
for him to go ahead. Just previous to this signal, ac-
cording to his testimony, Lewis had applied the brakes
on his motor-cycle for the purpose of slowing down,
and upon receiving the signal from the driver of the truck
he proceeded to go ahead; but the truck did not slow up
and when he saw it was not going to do so, he applied his
brakes but was unable to avoid a collision. Lewis' testi-
mony is corroborated, in regard to the timing of the signal,
by a witness named William Tison, who testified that he
was standing at the southeast corner of the intersection in
question at the time of the accident, and noticed the man
on the motor cycle and saw the truck about 50 feet from
Campbell Street, going down Adams Street; that he saw
the driver of the truck motion with his arm from left to
right; that at the time the motor-cycle was travelling at
from 15 to 20 miles an hour and the truck was going

considerably faster. Mrs. Leone Schimmel, called on behalf of the plaintiff, testified to the fact that she saw the driver of the truck motion with his right hand.

Patrick J. Mullin, the driver of the defendants' truck, testified that he talked with Banks and Banks told him something about having skidded. He denied having given Banks a signal to proceed. Fred W. Williams, a witness on behalf of the defendants, testified that when he first saw the motor-cycle it was probably 75 feet from the intersection, and must have been going in the neighborhood of 30 miles an hour; and that it did not slacken its speed, but the motor-cycle skidded into the side of the truck. Harvey Moller, the plaintiff, testified that he was riding on the rear seat of the motor-cycle and that as it approached Adams street it was slowing down; that he saw the Sears-Roebuck truck approaching the intersection and saw the driver put out his left hand and wave it across the front of his body; that the motorcycle continued to go ahead about 10 or 12 miles an hour, and the truck came right on at between 20 and 24 miles an hour; that the motor-cycle turned to avoid the accident, and the truck hit it; that the truck went about 15 feet before it stopped. It appears from the medical testimony in this case that the plaintiff sustained three wounds to his head, one over the temporal bone, one over the parietal bone, and one over the occipital protuberance at the back of the head, and that he was bleeding from the right ear and nose. Dr. Edward L. Denison, the attending physician testified that there was a hemorrhage under the tissues on the left side extending from under

considerably better. Mrs. Laura Robinson, lived on the
half of the estate, testified to the fact that the
the driver of the truck called him his name.
William A. Miller, the driver of the automobile, testified
that he called him his name and told him
something about having a drink. He denied having given
him a drink as proposed. When he testified, a witness on
behalf of the defendant, testified that when he first saw
the motor-cycle it was probably 75 feet from the entrance-
tion, and must have been moving in the neighborhood of 25
miles an hour; and that it did not clear the speed, but
the motor-cycle skidded into the side of the truck. Harry
Miller, the plaintiff, testified that he was riding in the
rear seat of the motor-cycle and that he is surrounded
about 10 feet in front of him; that he saw the motor-
cycle from the rear and that it was moving in the same
direction as the truck. The investigation was made by
driver got out his left hand and was in front of the truck
of his body; that the motor-cycle continued to go back about
15 to 20 miles an hour, and the truck was about 10 feet
between it and the motor-cycle; that the motor-cycle turned
to avoid the accident, and the truck hit it; that the truck
went about 10 feet before it stopped. It appears from the
medical testimony in this case that the plaintiff sustained
three wounds on his head, one over the forehead bone, one
over the parietal bone, and one over the occipital process
of the base of the skull, and that he was bleeding
from the right ear and nose. Dr. Edward J. Keelson, the
attending physician testified that there was a hemorrhage
under the skin on the left side extending from under

the armpit down to the outer aspect of the lower part of the leg; and in the superficial tissues over the hip and thigh and over the lumbar region; that there was a concussion of the brain, and that he attended him from the time of the accident up to the time of the trial of the case; that he also had an inflammation of the lining of the abdomen, had developed a heart murmur, passed blood in his urine and had developed a swelling of both limbs. He testified that he had called to see the plaintiff every day for three weeks and then every other day for five weeks; and that after that the plaintiff came to see him at his office on crutches; that he was treating him for stomach trouble and a nervous condition, pain in his back, right side and his heart; that there was a shortening in the limb on the right side, and that the right side of the pelvis extended upward and outward more than that on the left side; that X-ray pictures showed a deviation from the normal, the spinal column leaning a little to the left, and the last lumbar vertebra seeming to be smaller than the other, and the cartilage, the articulation between the fourth and fifth lumbar vertebra appeared to have been absorbed; that he found a condition of ankylosis; that in his opinion the conditions mentioned were permanent. A trial was had which resulted in a verdict of \$7,000 in favor of the plaintiff and against the defendants. Judgment was entered upon the verdict and it is from this judgment that this appeal is perfected.

It is urged as a ground for reversal of this judgment; first: That the verdict was against the manifest weight of the evidence; second: That the plaintiff was guilty of contributory negligence; third: That the court erred in giving instruction No. 1 on behalf of the plaintiff; and fourth: That the court erred in refusing to give an instruction on behalf of the defendants.

In support of the proposition that the finding is against the manifest weight of the evidence, counsel for defendants contend that the driver of the motor truck had the right of way given him by the statute, and that in approaching the intersection the driver of the truck had the right to rely upon the statute and the right given to him thereunder, and that plaintiff was guilty of contributory negligence in not observing the rule laid by the statute. The Motor Vehicle Act, section 33, (Cahill's Illinois Statutes, ch. 95a, par. 34) provides that: "All vehicles traveling upon public highways shall give the right of way to other vehicles approaching along intersecting highways from the right and shall have the right of way over those approaching from the left." It is true that this rule is applicable to collisions at street intersections, but the right of recovery under this statute must be considered in connection with all the other surrounding circumstances and does not confer an absolute right to recovery, Darling & Co. v. Yellow Cab Co. 238 Ill. App. 326 ;

It is urged as a ground for reversal of this judgment that the weight of the evidence, secondly, that the reliability of the testimony of the witnesses, thirdly, that the court erred in giving instruction No. 1 on behalf of the defendant; and fourthly, that the court erred in refusing to give an instruction on behalf of the defendant.

In support of the proposition that the finding is against the weight of the evidence, counsel for defendant contend that the driver of the motor truck had the right of way given him by the statute, and that in proceeding the intersection the driver of the truck had the right of way over the station and the right driver to him thereunder, and that defendant was guilty of contributory negligence in not observing the rule laid by the statute. The statute reads, section 11, Illinois Statutes, ch. 120, sec. 141 provides that: "All vehicles traveling upon public highways shall give the right of way to other vehicles approaching along intersecting highways from the right and shall have the right of way over those approaching from the left." It is true that this rule is applicable to collisions at street intersections, but the right of way over this station must be considered in connection with all the other surrounding circumstances and does not confer an absolute right to run.

Heidler Hardwood Lumber Co. v. Wilson & Bennett Co.,
243 Ill. App. 89.

In the case at bar the plaintiff's right to recover is based upon the proposition that the driver of the truck, by signaling the driver of the motorcycle to proceed, waived his statutory right and expressly yielded the right of way to the driver of the motorcycle. There is considerable testimony in the record bearing out this contention of the plaintiff; and if the driver of the motorcycle proceeded across the street intersection, relying upon the invitation of the driver of the truck, so to do, it certainly cannot be said that the driver of the truck could insist upon the statutory obligation that would arise under other and different circumstances. The same argument is applicable to the second ground for reversal urged by the defendants, namely, that plaintiff was guilty of contributory negligence. If the driver of the motorcycle had a right to rely upon the invitation of the driver of the truck, to proceed, then it cannot be said that the plaintiff, a passenger upon the motorcycle, could be guilty of contributory negligence. The negligence of the driver of the motorcycle could not be imputed to the passenger, and from the testimony of plaintiff, it appears that he also relied upon the invitation of the driver of the truck. A passenger is liable only by reason of his own negligence, and at the utmost would be required only to warn the driver of the vehicle on which he was riding of a danger which was apparent to the passenger.

In the case at bar the plaintiff's right to recover is based upon the representation that the driver of the truck, by accepting the offer of the motorcycle passenger, waived his statutory right and voluntarily placed himself at risk of loss of life or limb as the result of the accident. There is considerable testimony in the record bearing out this contention of the plaintiff; and if the driver of the motorcycle proceeded against the strict letter of the law upon the invitation of the driver of the truck, so far as it certainly cannot be said that the driver of the truck would incur upon the statutory obligation that he had taken under such circumstances. The most argument is applicable to the facts stated in the report made by the coroner, namely, that the driver of the motorcycle was negligent. If the driver of the motorcycle has a right to take the invitation of the driver of the truck, no question arises as to whether or not the driver of the truck is negligent, a question upon the facts which would be fully a matter of negligence. The negligence of the driver of the motorcycle could not be imputed to the passenger, and from the testimony of plaintiff, it appears that he also relied upon the invitation of the driver of the truck. A passenger is liable only by reason of his own negligence, and if the driver would be required only to warn the driver of the vehicle on which he was riding of a danger which was apparent to the passenger.

This rule has been laid down by the Supreme Court of this State, placing this obligation upon passengers riding in or upon vehicles, and we do not believe it should be extended any further. Instructions from the back seat often cause more harm than good. There is ample evidence to sustain plaintiff's theory of the accident, and the question of due care on the part of the plaintiff, became one of fact for the jury, and we cannot say that the testimony is so manifestly against the weight of the evidence that the verdict of the jury and the judgment of the trial court should be set aside. Pienta v. Chicago City Rys. Co., 284, Ill. 246.

It is also urged that plaintiff's given instruction No. 1, was erroneous, in that it instructed the jury that while the burden of proof was upon the plaintiff, still they could find in his favor if the evidence preponderated in his favor "although but slightly." The court gave an instruction on behalf of the defendants stating that plaintiff was required to prove his case by a preponderance of the evidence and that "by evidence, which on the whole is more convincing than the evidence on the other side," if there was error in the giving of the instruction on behalf of the plaintiff, it certainly was cured by the giving of the instruction on behalf of the defendants. The refinement "although but slightly," added to the plaintiff's instruction, although objectionable, was not more so than the refinement "by evidence, which on the whole is more convincing than the evidence on the other side," found in defendants' given instruction. We are of the

opinion that the objection to plaintiff's given instruction No. 1, is not of such a character as should require a reversal of the cause.

Counsel for defendants also urge that the court erred in refusing to give defendants' instruction No. 26. This was a cautionary instruction and the failure to give it was not such error as should cause a reversal of the judgment. A large number of instructions were given on behalf of the defendants, and the jury was fully informed as to the law from the defendants' viewpoint.

For the reasons stated in this opinion, the judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR, F.J. AND NOLSON J. CONCUR.

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TAYLOR, J. L. AND ...

390 - 32331

DORA EISENSTEIN and JOSEPHINE
SILVERBERG,

Appellees,

v.

GEORGE C. ADAMS, MINERVA J. ADAMS
and SIEGEL E. YOUNG,

Appellants.

APPEAL FROM

MUNICIPAL COURT
OF CHICAGO.

Opinion filed June 20, 1928.

MR. JUSTICE WILSON delivered the opinion of the court.

Plaintiffs, Dora Eisenstein and Josephine Silverberg, filed their suit in the Municipal Court in forcible entry and detainer on February 15, 1927, charging that the defendants, George C. Adams, Minerva J. Adams and Siegel E. Young, were unlawfully withholding possession of certain premises known as the southeast corner of Grand Boulevard and East 50th Street in the City of Chicago, the property of the plaintiffs. A trial was had before a jury and, at the close of the evidence, the court instructed the jury to return a verdict in favor of the plaintiffs and against the defendants, finding that said premises were unlawfully held and detained by the defendants. Judgment was entered on the verdict April 17, 1927, an appeal was prayed and allowed on condition that the defendants file an appeal bond, conditioned according to law in the sum of \$8,500.00, which bond was to be approved by the court; said bond to be approved and

100 - 1011

JOHN RICHMOND and MARY
RICHMOND

Appellants

GEORGE G. ADAMS, MARY A. ADAMS
and RICHARD L. ADAMS

Appellees

Opinion filed June 20, 1937

MR. JUSTICE STONE delivered the opinion of the

court.

Plaintiffs, John Richmond and Mary Richmond, living-

here, filed their suit in the Municipal Court in Toronto
and obtained an order on January 12, 1937, ordering that the
defendants, George G. Adams, Mary A. Adams and Richard L.
Adams, were unlawfully withholding possession of certain
premises known as the southeast corner of Grand Boulevard
and West 80th Street in the City of Chicago, the property
of the plaintiffs. A writ was had before a jury and, at
the close of the evidence, the court instructed the jury to
return a verdict in favor of the plaintiffs and against the
defendants, finding that said premises were unlawfully held
and retained by the defendants. Judgment was entered on the
verdict April 11, 1937, an appeal was prayed and allowed on
condition that the defendants file an appeal bond, condition-
ed according to law in the sum of \$5,000.00, which bond was
to be approved by the court; said bond to be approved and

filed within five days from the date of the judgment.

On April 18, 1927, the appeal bond was presented and filed and an order was entered continuing the time for examination of the surety to April 19th. The record shows that on April 18th, the bond was filed, but there appears to be a certificate of the clerk; that it is not now among the files and cannot now be found. April 18th, an order appears of record, entered by a judge of the Municipal court, but not the judge before whom the cause was heard, approving the bond and ordering it to be filed and allowing and permitting an appeal from that order to the Appellate court. April 19th, more than five days after the judgment, the same judge, who, on the previous day had ordered the bond filed and approved, entered an order striking said bond from the files and giving the defendants leave to file an appeal bond in five days. April 20th, before the same court, an appeal bond was presented and approved and ordered filed. April 20, 1927, a motion was made to vacate the order of April 20th, approving said bond, which motion was denied. Among other things it is urged by counsel for plaintiffs, Dora Eisenstein and Josephine Silverberg, that this court has no jurisdiction to consider this appeal for the reason that the bond, upon which this appeal is based, was filed more than five days after the entry of the judgment and, consequently, in violation of the statute requiring that bonds shall be filed in forcible entry and detainer cases within that period of time. Chap. 57, Cahill's Ill. Rev. Stats. 1927, known as the Forcible

which within five days from the date of the judgment.

On April 14, 1937, the appeal bond was presented

and filed and an order was entered confirming the time for examination of the surety as April 1937. The record shows that on April 1937, the bond was filed, but there appears to be a possibility of the clerk that it is not now known the time and manner how to be found. April 1937,

an order appears of record, entered by a judge of the Municipal court, not that the judge before whom the bond was heard, approving the bond and ordering it to be filed and allowing and certifying an appeal from that order to the Appellate court. April 1937, more than five days after

the judgment, the same judge, who, on the previous day had ordered the bond filed and approved, entered an order stating said bond from the filed and giving the defendant leave to file an appeal bond in five days. April 1937, before the same court, an appeal bond was presented and approved and ordered filed. April 14, 1937, a motion was

made to vacate the order of April 1937, approving said bond, which motion was denied. Again that thing is to be noted

in regard to the judgment, the defendant has no objection to the

this appeal for the reason that the bond, upon which this appeal is based, was filed more than five days after the

entry of the judgment and, consequently, in violation of the statute providing that bonds shall be filed in favorable

entry and certain cases within that period of time. Chap. 87, Section 111, Rev. Stat. 1937, known as the favorable

Entry and Detainer Act, provides, par. 19, as follows:

"If any party shall feel aggrieved by the verdict of the jury or decision of the court, upon any trial had under this Act, such party may have an appeal, to be taken to the same courts, in the same manner and tried in the same way as appeals are taken and tried in other cases. Provided, the appeal is prayed and the bond is filed within five (5) days from the rendition of the judgment, and no writ of restitution, shall be issued in any case until the expiration of said five (5) days."

In the case at bar the bond was stricken from the files, so that there was no bond of record within the statutory period required. The record, as it appears, discloses that the bond upon which this appeal is predicated was filed more than five (5) days after the entry of the judgment. There was no order extending the time to file a bond which was entered within the five (5) day period required by law. By striking the bond from the files, April 19th, it left the record without any bond upon which an appeal could be predicated. The subsequent order, granting leave to file a bond within five days thereafter, was a nullity as the court was without jurisdiction. The action in forcible entry and detainer is a special and statutory action in derogation of the common law and, under such circumstances, must be strictly followed and must conform strictly to the requisites of the statute. Wentworth v. Bankston, 335 Ill. App. 48; Lilly v. Lilly, 340 Ill. App. 488. To the same effect is National Bank of Commerce v. Church, 135 Ill. App. 310, holding that an appeal bond, filed and approved

100-33861-36 now listed with the name of the person at

[illegible]

after the time limited for the order granting the appeal, is a nullity and the appeal should be dismissed unless, before the expiration of the time for filing, an order has been entered extending the time.

This cause was before this court on an appeal from a decree of the Superior Court in which a bill was filed by George C. Adams, Minerva J. Adams and Siegel E. Young, defendants in this forcible entry and detainer suit now before us for consideration, praying that the plaintiffs in this suit, Dora Eisenstein and Josephine Silverberg, be restrained from prosecuting this forcible entry and detainer suit. This matter was heard on its merits by the learned chancellor of the Superior Court, and the bill was dismissed for want of equity and on appeal from that decree this court, after a full consideration of all of the facts, sustained the decree of the Superior Court. Adams, et al v. Eisenstein, et al, Gen. No. 32307, (not reported). Opinion filed May 2, 1928.

By reason of the fact that the appeal bond filed in this cause, now on hearing before this court in the forcible entry and detainer case on appeal from the Municipal Court of Chicago, does not comply with the statutory requisites and was not filed within the five day period, it is ordered for the reasons expressed in this opinion that the appeal be and the same is hereby dismissed.

APPEAL DISMISSED.

TAYLOR, P.J. AND HOLDEN, J. CONCUR.

after the time limited for the answer granting the appeal, in a nullity and the appeal should be dismissed unless, before the expiration of the time for filing an answer has been entered extending the time.

This cause was before this court on an appeal from a decree of the Superior Court in which a bill was filed by George G. Adams, Plaintiff, against J. Adams and George E. Young, Defendants in this Petition entry and certain acts and before us for consideration, arising from the petition in this suit. Upon consideration and examination of the record, we find that the petition in this Petition entry and certain acts and before us was based on the merits of the alleged charges of the Superior Court, and the bill was dismissed for want of equity and we affirm the decree of the Superior Court. Full consideration of all of the facts, including the answer of the Superior Court, filed at St. Louis, Missouri, at St. Louis, Mo., Dec. 14, 1907, (last revised), which was filed on Dec. 14, 1907.

By reason of the fact that the appeal was filed in this cause, now on hearing before this court in the Petition entry and certain acts on appeal from the Superior Court of Chicago, does not comply with the statutory regulations and was not filed within the five day period, it is ordered that the reasons expressed in this opinion that the appeal be and the same is hereby dismissed.

APPEAL DISMISSED.

WILLIAM F. H. AND GEORGE E. YOUNG.

249 I.A. 643⁵

394 - 32335

THOMAS BODKIN and HJALMAR
CHELBERG,

Appellees,

v.

IRVING ISADOR,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO

Opinion filed June 20, 1928.

MR. JUSTICE WILSON delivered the opinion of
the court.

Plaintiffs' statement of claim charges that the plaintiffs, Thomas Bodkin and Hjalmar Chelberg, on the 31st day of January, A.D. 1923, entered into a written lease, as lessees, with Irving Isador, defendant, as lesser, and attached to the statement of claim was a copy of the lease marked exhibit "A" and made a part thereof; that the said lease was for certain store room and basement space and flat above in and upon the premises designated as 3144 North Clark street, in the City of Chicago for the period from May 1st, 1923 to April 30, 1927, for the sum of fifteen thousand three hundred (\$15,300.00) dollars, payable in monthly installments, as follows: three hundred (\$300.00) dollars on the first day of May 1923, and three hundred (\$300.00) dollars per month until April 30, 1925, and three hundred and twenty five (\$325.00) dollars per month until April 30, 1926, and three hundred and fifty (\$350.00)

dollars per month thereafter until the expiration of said lease.

Charges further that the said lease contained, among other things, the following provision:

"Lessees have paid to lessor the sum of ten hundred fifty dollars (\$1,050) as payment of rent for the months of February, March and April for the year 1927 and also as security against any damages or expense which the lessor may at any time during the terms of this lease sustain or incur by reason of the lessees at any time violating any city ordinance or State or National laws while occupying said premises. In case the lessor sustains any such loss or damages then he shall have the right to deduct from said ten hundred fifty dollars (\$1,050) the amount of such loss or damage and the lessees shall thereupon be obligated to replace such amount immediately."

Plaintiffs further charge that the said sum of ten hundred and fifty (\$1,050) dollars was paid at the time of the entering into of said lease. Further charges that plaintiff occupied said premises from the first day of May, 1923, and paid rent as provided for in said lease, up to and including the month of January, 1924; that on the 4th day of February, 1924, the defendant served, or caused to be served, a landlord's five day notice to vacate the premises and filed a suit in forcible entry and detainer, and, on the 26th day of February, 1924, judgment in favor of the said Irving Isador was entered, giving him possession of said premises. And charges that, by reason thereof, the said lease became and was terminated. Charges further, that plaintiffs surrendered possession of said premises and have not occupied them since that date. Charges further, that the said defendant still has and retains the sum of ten hundred

How to get more out of your retirement account

University of Illinois at Chicago

1. The first step is to identify the problem. This involves understanding the symptoms and the context in which they are occurring.

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THE UNIVERSITY OF CHICAGO LIBRARY

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ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

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To understand what we're doing here, let's look at the first part of the document.

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and fifty (\$1,050) dollars and that no damages were sustained by the defendant by reason of the violation of any of the terms of said lease. Charges further that the rent for the month of February, up to and including the 26th day thereof, at which time the defendant obtained possession in the forcible entry and detainer suit, amounted to two hundred sixty eight and 34/100 (\$268.34) dollars, and that the plaintiff is entitled to the balance of ten hundred and fifty (\$1,050) dollars, after deducting that amount of rent and that, therefore, the plaintiffs are entitled to the sum of seven hundred seventy seven and 06/100 (\$777.06) with interest at the rate of five percent (5%) per annum from and after February 26, 1924.

Plaintiffs further charge that demand was made for payment but has been refused.

To this statement of claim defendant filed an affidavit of merits, which was stricken and thereupon an amended affidavit of merits was filed. By this amended affidavit the defendant sought to avoid liability by reason of a violation of a clause, heretofore referred to, set out in the statement of claim, charging that the plaintiff had violated the city ordinances and national law referred to in said provision of the lease and plaintiff's place of business was closed by the police department of the city of Chicago and, therefore, the plaintiffs were not entitled to recover.

A jury was waived and the cause was tried by the court without a jury and a finding against the defendant was had and plaintiffs' damages assessed at the sum of eight hundred fifty nine and 32/100 (\$859.32) dollars, on which finding judgment was entered and it is from this judgment that the appeal is perfected.

The lease in question is referred to and cited in the briefs both of plaintiffs and defendant, but nowhere in the abstract do we find a copy of said lease nor is it indexed in the abstract among the exhibits. It does not appear to have been introduced in evidence and the only reference obtainable, aside from an examination of the record is the provision contained in plaintiffs' statement of claim. This court will resort to the record only to affirm and not to reverse. Parties to the suit are presumed to present their cause to this court in their abstracts.

Rule 16 of this court provides: That the abstract shall contain a complete index and

"The abstract must be sufficient to present fully every error and exception relied upon, and it will be taken to be accurate and sufficient for a full understanding of the questions presented for decision unless the opposite parties shall file a further abstract, making necessary correction or additions, which he may do if he deems it necessary to a full understanding of the merits of the cause."

Because of the failure of plaintiff to present the record to this court in his abstract, in accordance

-4-

A jury was sworn and the cause was tried by the court without a jury and a finding against the defendant was had and plaintiff's damages assessed at the sum of eight hundred fifty nine and thirty five (859.35) dollars, on which judgment was entered and it is from this judgment that the appeal is perfected.

The issue in question is referred to and cited in the briefs both of plaintiff and defendant, but nowhere in the record do we find a copy of said issue nor is it indexed in the abstract among the exhibits. It does not appear to have been introduced in evidence and the only reference applicable, aside from an examination of the record is the provision contained in plaintiff's statement of claim. This court will resort to the record only to clarify and not to reverse. Hence to the end we presumed to present their cause to this court in their abstracts.

Rule 18 of said court provides: That the abstract shall contain a complete index and

"The abstract shall be sufficient to present fully every error and exception which may be taken to the judgment and shall contain a full understanding of the questions presented. The abstract shall contain the specific matters which are in controversy, setting forth the facts and the issues, which we may do if we deem it necessary to a full understanding of the nature of the cause."

Because of the failure of plaintiff to present the record to this court in his abstract, in accordance

with that rule of the court, it is necessary for this court to affirm the judgment in compliance with its rules.

We have, however, examined the merits of the cause and are of the opinion that there appears to be no testimony in the abstract showing any loss or damage sustained by reason of the violation of the provisions of the lease set up in the statement of claim and hereinbefore referred to. The ten hundred and fifty (\$1,050) dollars paid by the plaintiffs, at the time of the execution of the lease was a penalty and not liquidated damages. By bringing a suit in forcible entry and detainer and obtaining a judgment for possession and taking possession thereunder, the defendant, Irving Isador terminated the lease and the ten hundred and fifty (\$1,050) dollars received by him for rental for the last three months of the term should be returned, after deducting, as was done in this case, the rent which had accrued at the time of the entry of the judgment for possession. Bunn v. Batenberg, 208 Ill. App. 300; Virginia Amusement Co. v. Mid-City Trust & Savings Bank, 220 Ill. App. 147.

For the reason stated in this opinion the judgment of the trial court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR, P.J. AND HOLDON, J. CONCUR.

with that rule of the court, it is necessary for this court to affirm the judgment in accordance with its intent.

It is hereby affirmed, confirmed and the writs of the

court and one of the parties that there appears to be no
prejudice in the judgment excepting any issue or issues
raised by reason of the violation of the provisions of the
law set up in the statement of claim and counterclaim
before the court. The ten thousand and fifty (\$10,500) dollars paid
by the plaintiff, at the time of the execution of the
issue was a penalty and not liquidated damages. By bringing
a suit in forcible entry and detainer and obtaining a judgment
and the payment of the same and being necessary to the
defendant, having thereby satisfied the issue and the ten
thousand and fifty (\$10,500) dollars received by him for money
for the last three months of the term should be returned, after
deduction, as was done in this case, the rent which had accrued
at the time of the entry of the judgment for possession. 1888
No. 111. 1888. 1888. 1888. 1888. 1888. 1888. 1888. 1888. 1888.
No. 111. 1888. 1888. 1888. 1888. 1888. 1888. 1888. 1888. 1888.

For the reasons stated in this opinion the judgment
of the trial court is affirmed.
JAMES M. HARRIS,
TAYLOR, J. and HARRIS, J. JUDGES.

21 - 32438

WALENTY ROSZKOWIAK,

Defendant in Error,

v.

ALOZY ROSZKOWIAK and ANNA
ROSZKOWIAK, his wife,

Plaintiff in Error.

ERROR TO

MUNICIPAL COURT
OF CHICAGO.

Opinion filed June 20, 1928

MR. JUSTICE WILSON delivered the opinion of
the court. On rehearing.

The plaintiff, Walenty Roszkowski, filed his certain statement of claim in the Municipal Court of Chicago, charging that the defendants, Aloyz Roszkowski and Anna Roszkowski, his wife, were indebted to him in the sum of \$422 for moneys advanced to them at their request and which they had refused to pay upon demand. Summons issued, returnable to the 16th day of March, 1928, and was served upon both defendants. On that day a certain appearance was entered by the defendants and a demand made for a jury trial. November 9, 1928, the cause was reached for trial and was assigned to one of the judges of the Municipal Court for that purpose. On the date aforesaid the cause was continued to December 14, 1928, and on December 15, 1928, a trial ex parte before a jury was had and a verdict returned against the defendants in the sum of \$422 and costs, and judgment entered upon the verdict. The defendants were not present at the time of the trial nor were they represented by counsel.

From the record it appears that the cause came on in regular course for trial and that the defendants were absent and not represented. On June 7, 1927, a motion was entered to vacate the judgment. This motion was overruled and, from the order overruling this motion, an appeal was prayed and allowed.

An additional abstract was filed on behalf of the plaintiff, setting out at considerable length the matters contained in the written motion for a new trial, but we find no such written motion in the common law record, nor do we find any bill of exceptions preserving said motion and affidavit accompanying the same for review, and, for that reason, we can not take into consideration the matters presented in support of the motion to vacate.

It is urged as a ground for reversal that it was the duty of the court on the return day of the summons to set the cause for trial for a day certain, as provided by statute, and that it does not affirmatively appear from the record that such was done. This precise question has been before this court for consideration and determination in the case of Elliott, et al v. Greene, 172 Ill. App. 213, where the court in its opinion says:

"The only ground urged for reversal is that this being a case of the fourth class it was imperative on the court to set it down for trial, and that no order of record to that effect appears.

The record shows that defendant entered his appearance December 6th, the return day of the summons, and that judgment was entered on December 17th. The judgment order recites that the cause came up in the regular course for trial, and that defendant was absent and not represented - presumably meaning at the trial. There is nothing to show that the court did not proceed regularly, and,

From the record it appears that the cause came on in regular course for trial and that the defendant was absent and not represented. On June 7, 1937, a motion was entered to vacate the judgment. This motion was overruled and, from the order overruling this motion, an appeal was prayed and allowed.

An additional abstract was filed on behalf of the plaintiff, setting out at considerable length the matters contained in the written motion for a new trial, but we find no such written motion in the common law record, nor do we find any bill of exceptions preserving said motion and affidavit accompanying the same for review, and, for that reason, we can not take into consideration the matters presented in support of the motion to vacate.

It is urged as a ground for reversal that it was the duty of the court on the return day of the summons to set the cause for trial for a day certain, as provided by statute, and that it does not affirmatively appear from the record that such was done. This practice question has been before this court for consideration and determination in the case of Willott, et al. v. Greene, 178 Ill. App. 218, where the court in its opinion says:

"The only ground urged for reversal is that this being a case of the fourth class it was imperative on the court to set it down for trial, and that no order of record to that effect appears. The record shows that defendant entered his appearance December 8th, the return day of the summons, and that judgment was rendered on December 17th. The judgment order recites that the cause came up in the regular course for trial, and that defendant was absent and not represented - ground - being nothing at the trial. There is nothing to show that the court did not proceed regularly, and

in the absence of a showing to the contrary, the presumption is that it did, and that it set the cause for trial at the time of defendant's appearance, as it might do under Section 45 of the Municipal Court Act."

We believe this case states the rule correctly, under the circumstances, and have no reason to differ therewith. Every intendment is indulged in favor of the regularity of the proceedings, and, in view of the fact that it appears from the judgment order that the case was reached in its regular course for trial, we are of the opinion that the judgment of the trial court should be and is affirmed.

JUDGMENT AFFIRMED.

TAYLOR, P.J. AND HOLDOM, J. CONCUR.

in the absence of a showing to the contrary,
the presumption is that it did, and that it was
the cause for trial at the time of defendant's
arrest, as it might be under Section 15 of
the Criminal Code Act.

We believe this case states the rule correctly.

under the circumstances, and have no reason to differ
therefrom. Every statement is indulged in favor of
the regularity of the proceedings, and, in view of the fact
that it appears from the judgment order that the case was
tried in the regular course for trial, we are of the
opinion that the judgment of the trial court should stand
is affirmed.

TAYLOR, J., and WILSON, J. CONCUR.

VALENTY SOBIESEKI, and
FRANCISKA SOBIESEKI,

Appellants,

v.

KING JOHN 3RD SOBIESEKI NO. 1
BUILDING AND LOAN ASSOCIATION,
a corporation,

Appellee.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

Opinion filed June 20, 1928,

MR. JUSTICE WILSON delivered the opinion of the
court.

The bill in this case charges that the complain-
ants, Valenty Sobieski and Franciska Sobieski, his wife,
on the 11th of December, 1922, entered into an agreement
with the defendant, King John 3rd Sobieski No. 1 Building and
Loan Association, a corporation, by which the defendant agreed
to convey to the complainants a certain piece of real estate
located in or near West Hammond, Illinois, for a consideration
of \$4500.00. Charges further that the complainants paid in
cash \$100.00 to the defendant as a deposit at the time said
contract was executed, with an understanding that \$200.00
additional was to be paid on the 13th day of December, 1922,
when the contract for warranty deed was to be executed and
delivered. Charges further that the complainants were to pay
the balance of the \$4500.00 purchase price in installments
of \$25 each, payable monthly on the 13th day of each and every
month thereafter and commencing on the 13th day of January
1923, together with interest. Charges further that the com-
plainants are ready, willing and able to comply with the terms

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92 - 2445

THE FOLLOWING INFORMATION WAS OBTAINED FROM THE RECORDS OF THE
BUREAU OF THE INSURANCE COMPANY OF AMERICA, NEW YORK, N.Y.
ON THE 15TH DAY OF JANUARY, 1935, AT NEW YORK, N.Y.
THE FOLLOWING INFORMATION WAS OBTAINED FROM THE RECORDS OF THE
BUREAU OF THE INSURANCE COMPANY OF AMERICA, NEW YORK, N.Y.
ON THE 15TH DAY OF JANUARY, 1935, AT NEW YORK, N.Y.

Official File No. 1335

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

DATE

THE BILL IN THIS CASE CHARGES THAT THE INSURANCE

COMPANY, INSURANCE COMPANY OF AMERICA, NEW YORK, N.Y.

ON THE 15TH DAY OF JANUARY, 1935, CHARGES THAT THE INSURANCE

COMPANY, INSURANCE COMPANY OF AMERICA, NEW YORK, N.Y.

FROM INSURANCE COMPANY OF AMERICA, NEW YORK, N.Y.

TO ADVISE THAT THE INSURANCE COMPANY OF AMERICA, NEW YORK, N.Y.

INSURED IN OR WITH THE INSURANCE COMPANY OF AMERICA, NEW YORK, N.Y.

OF 1935, N.Y. INSURANCE COMPANY OF AMERICA, NEW YORK, N.Y.

ON THE 15TH DAY OF JANUARY, 1935, CHARGES THAT THE INSURANCE

COMPANY, INSURANCE COMPANY OF AMERICA, NEW YORK, N.Y.

ADDITIONAL WAS TO BE MADE ON THE 15TH DAY OF JANUARY, 1935,

WHEN THE INSURANCE COMPANY OF AMERICA, NEW YORK, N.Y.

DELIVERED. CHARGES THAT THE INSURANCE COMPANY OF AMERICA, NEW YORK, N.Y.

THE INSURANCE COMPANY OF AMERICA, NEW YORK, N.Y.

OF THE INSURANCE COMPANY OF AMERICA, NEW YORK, N.Y.

ON THE 15TH DAY OF JANUARY, 1935, CHARGES THAT THE INSURANCE

COMPANY, INSURANCE COMPANY OF AMERICA, NEW YORK, N.Y.

DELIVERED AND CHARGES THAT THE INSURANCE COMPANY OF AMERICA, NEW YORK, N.Y.

of the contract and have repeatedly offered to pay the sum of \$3000.00, but that the defendant refuses to perform its part of the agreement or to make or deliver a contract for a warranty deed.

The written contract referred to which is made an exhibit and attached to the bill, is as follows:

" West Hammond, Illinois,
December 11, 1922,

"Received from Valenty Bobekenski and Franciszka Sobczanski, \$100.00, deposit on L. 12 and 13, B. 4, Hegewisch Sub. of S. W. $\frac{1}{4}$ of N.E. $\frac{1}{4}$ of S. 163.82 ft. of Nor. 1152. 3ft of N.E. $\frac{1}{4}$ of N.E. $\frac{1}{4}$ of Section 21, T. 37 N., R. 15 East of 3rd P.M., \$3000.00 more to be paid December 13, 1922, when real estate contract is to be given. Contract of sale \$4500.00.
King John 3rd Sobieski,
No. 1 Building and Loan
Association.
Arnold B. Krylsanowski,
Secretary."

The defendant answered said bill and charges that no written agreement between the plaintiffs and the defendant was entered into on the 11th day of December, 1922, but insist said written instrument was but a receipt; acknowledging receipt of the \$100.00 deposit and stated that \$3000.00 was to be paid on December 13, and said they were willing and ready to perform their part of the agreement but that the complainants failed and refused to pay the defendant the sum of \$3000.00 under the terms of said agreement on December 13th and that, upon the failure of said defendant so to tender said sums of money at the time so specified, the defendant contracted with others for the disposition of said property.

The above information was obtained from the files of the
Bureau of Investigation.

1. The first part of the document is a letter from the President of the United States to the President of the Senate, dated January 1, 1901. The letter is signed by William McKinley and is addressed to John D. Long. The letter is a copy of a letter that was sent to the President of the Senate by the President of the United States. The letter is a copy of a letter that was sent to the President of the Senate by the President of the United States. The letter is a copy of a letter that was sent to the President of the Senate by the President of the United States.

The defendant answered with all due haste that no written agreement between the plaintiff and the defendant was entered into on the 11th day of November, 1935, and that no such written agreement was now in existence; and notwithstanding receipt of the \$100.00 deposit and stated that \$100.00 was to be paid on December 15, and said that said plaintiff was ready to perform their part of the agreement; but that the defendant failed and refused to pay the defendant the sum of \$100.00 under the terms of said agreement as then made; and that, upon the failure of said defendant to perform said cause of money at the time so specified, the defendant contracted with others for the disposition of said property.

The defendant filed a cross-bill in addition to its answer charging that the defendants to the cross bill had an abstract to said property which abstract belonged to cross-complainant and which the said defendants refused to turn over and asking that they be ordered and directed so to do. To this cross-bill complainants filed an answer admitting that the defendant owned the property as alleged and admitting further that they received the abstract of title, but that it was not a complete abstract and that they, the cross-defendants, were compelled to bring said abstract of title down to date at their own expense.

The Master in Chancery, to whom said cause was referred, found the issue against the complainants on their bill and in favor of the cross-complainant on its cross-bill and recommended that the prayer of the cross-bill be allowed and that the equities be found with the defendant to the original bill.

The court, upon the hearing of objections to the Master's Report sustained said report, and overruled the objections filed on the part of the complainants and ordered that the bill of complaint be dismissed for want of equity and that the prayer of the cross-bill filed by the defendant and cross-complainant be allowed, and that the defendants to the cross-bill be directed to turn over the abstract of title in their possession within ten days after the entry of the decree.

Complainants by leave of court, filed an amendment to their bill in which it is charged that the defendant to the bill had agreed to extend the time for the completion of

The defendant filed a cross-bill in addition to
its answer charging that the defendant in the cross bill was
an officer or agent of the plaintiff with respect to the
complaint and that the said defendant refused to turn
over and seeing that they be returned and returned to the
To this cross-bill complaint filed an answer charging
that the defendant owned the property as alleged and admit-
ting further that they received the same as stated in the
that it was not a complete answer and that they, the cross-
defendants, were entitled to have the return of the
now to date of their own answer.

The answer in answer, to show said answer was
returned, found the issue against the complaint in the
bill and in favor of the cross-complaint in the cross-bill
and recommended that the order of the cross-bill be allowed
and that the writ be issued with the defendant in the
original bill.

The court, upon the hearing of objection to the
master's report sustained said report, and overruled the ob-
jections filed on the part of the complainant and ordered that
the bill of complaint be dismissed for want of equity and
that the answer of the cross-bill filed by the defendant and
cross-complaint be allowed, and that the defendant in the
cross-bill be directed to turn over the return of title in
their possession within ten days after the entry of the decree.
Complaints by favor of court, filed as answered
in which bill in which it is charged that the defendant in
the bill had agreed to extend the time for the completion of

the contract for the purchase and sale of said real estate until the abstract could be brought down to date.

It would serve no useful purpose to discuss the evidence. There appears to be a well defined conflict between the testimony of the witnesses on behalf of the complainants and on behalf of the defendant. The court found that there was no waiver of the terms of the contract and that the sum of \$900.00 to be paid under the terms of the receipt was not paid on December 13, as specified under that instrument.

Under the circumstances there is no question of law for this court to pass upon. It cannot be said that the finding of the Chancellor was against the manifest weight of the evidence and we find no reason for disturbing his decree. The burden of proof was upon the defendant to sustain the allegations of the amended bill charging waiver and were in direct contradiction to charges in the original bill which alleged performance.

The rule is well established in this State that the burden of proof is upon the complainant to establish all the facts necessary for a recovery, viz., that the purchaser is ready, willing and able to perform the contract on his part before he is entitled to a decree for specific performance.

Congregation Dorshe Tov Anshe Poland v. Congregation Shai David Chave Zedek, et al., 300 Ill. 115.

The Chancellor found that the complainants did not so establish their case and we find no reason to hold otherwise.

For the reasons expressed in this opinion the decree of the Superior Court is affirmed.

TAYLOR, P. J. AND HOLDOM, J. CONCUR. AFFIRMED.

It would seem an unlikely, indeed an impossible, coincidence that the same person should have been the author of the letter to the President and the letter to the Secretary of the Navy. The fact that the letter to the President was dated December 1, 1917, and the letter to the Secretary of the Navy was dated December 2, 1917, is also a coincidence. The fact that the letter to the President was signed "John Doe" and the letter to the Secretary of the Navy was signed "John Doe" is also a coincidence. The fact that the letter to the President was signed "John Doe" and the letter to the Secretary of the Navy was signed "John Doe" is also a coincidence.

Under the circumstances there is no possibility of
law for this court to pass upon. It cannot be said that the
finding of the Chancellor was against the manifest weight
of the evidence and so that no reason has been shown for
reversal. The Court is thus left with the finding of the
Chancellor and the evidence will be given weight and value
in light of the evidence as shown in the original bill which

The rule is well established in this State that the burden of proof is upon the complainant to establish all the facts necessary for a recovery, viz., that the purchaser is guilty, willing and able to perform the contract on his part before he is entitled to a decree for specific performance.

1. The Director of the Bureau of Investigation, Department of Justice, is requested to advise the Bureau of the results of the investigation conducted by the Bureau of the above-captioned matter.

32613

GERMAINE SNIDER,

Appellant,

v.

CHARLES H. SNIDER,

Appellee.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

Opinion filed June 20, 1928

MR. JUSTICE WILSON delivered the opinion of the court.

This is an appeal from an interlocutory order entered on a motion for temporary alimony and solicitor's fees. The order provided for solicitor's fees, but denied any allowances as temporary alimony. The bill filed in the cause by the complainant, Germaine Snider, against the defendant, Charles H. Snyder, charges desertion and a course of unkind and cruel conduct on the part of the defendant, and asks for separate maintenance.

Charges further that the defendant is possessed of a large personal estate of about the value of \$13,000 and is earning approximately \$200 a month; charges that she has no money and asked that the writ of Re Grant issue against the defendant, which was ordered issued.

The defendant, Snider, filed a petition asking to have said writ quashed, stating therein that he had made repeated efforts to effect a reconciliation with his wife and

that he had a good and meritorious defense to the whole of complainant's bill of complaint. Denies that he deserted the complainant and states that he is ready, willing and able to provide a home for her, but that she refuses to return and live with him.

It appears from the records that an order was entered by the trial court quashing the writ and, therefore, this motion for temporary alimony and solicitor's fees was presented to that court for consideration.

From the testimony it appears that there were no children born as a result of the marriage and that the defendant was a steward working at various times in hotels and eating places; that at the time in question he was employed at a Y.M.C.A. cafeteria, earning about \$150 a month. It also appears from the testimony that the complainant had been in the habit of working and had earned \$60 a month but, that at the time of the hearing, she was not employed, but was able to do house work at which she could earn from \$10 to \$12 per week, when employed.

The testimony in the cause was very brief and the court, after consideration of the testimony, denied the motion for temporary alimony, but allowed \$60 as and for solicitors' fees for the complainant in the prosecution of her case.

At the end of the testimony, the court suggested that the cause would be placed upon the calendar immediately, upon the filing of an answer, and from the record we are led to believe that it was intended that the calendar referred to

that he had a good and satisfactory balance in the whole of
complaint's bill of complaint. He said that he had
the complaint and stated that he is very, willing and
able to provide a home for her, and that she returns in the
turn and live with him.

It appears from the records that an order was en-
tered by the trial court granting the wife and, therefore,
this action for temporary alimony and complaint's loss was
presented to that court for consideration.

From the testimony it appears that this was an
admitted case as a result of the marriage and that the defendant
and was a person residing at various times in Texas and ending
himself; that at the time in question he was employed as a
T.E.C. minister, residing about 1911-1912. It also
appears from the testimony that the complaint had been in
the hands of the court and had been for a while, but at
the time of the hearing, was not yet completed, but was able to
do some work at which she would earn from \$10 to \$15 per
week, with interest.

The testimony in the case was very brief and the
court, after considering it, the complaint, stated the matter
for temporary alimony, but allowed \$10 as and for alimony;
that for the complaint in the prosecution of her case.

At the end of the testimony, the court suggested
that the same would be placed upon the witness stand, and
from the filing of an answer, and from the record as was led
to believe that it was intended that the complaint referred to

was the trial calendar.

The right to an allowance as temporary alimony pendente lite is not an absolute right. The court may, or may not grant it, within its discretion and, unless this discretion is abused, this court will not reverse a finding denying it.

The Supreme Court of this State in the case of Cooper v. Cooper, 125 Ill. 163, in its opinion says:

" Whether temporary alimony should be allowed, and, if so, how much, are questions resting in the judicial discretion of the court in view of the conditions and circumstances of each case, and an abuse of the discretion is necessarily subject to review. Unless, however, there is clearly an abuse of the discretion, the decree will not, ordinarily, be disturbed on appeal."

We have examined the facts, as shown by the testimony and the record, and we are unable to say that there had been an abuse of discretion by the trial court in denying the action for alimony pendente lite and, for that reason, the order of the trial court is affirmed.

ORDER AFFIRMED.

TAYLOR, P.J. AND HOLDEN, J. CONCUR.

32541

ALBERT JAMPOLIS,

Appellee,

v.

ADOLPH TROST and EMIL MACK,

ADOLPH TROST,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed June 20, 1928

MR. JUSTICE WILSON delivered the opinion of the court.

This is an action brought by the plaintiff, Albert Jampolis, against the defendants, Adolph Trost and Emil Mack, sued jointly.

The statement of claim filed charges that the plaintiff's claim is for compensation due him for services rendered the defendants by reason of his procuring a purchaser for a certain motor truck, for which services the defendants agreed to pay a commission of \$300.00.

Summons issued and was returned served on Trost, who entered his appearance. The summons was returned endorsed, "Served the within summons on Adolph Trost, by delivering a copy thereof to him." There is no return of the bailiff of the Municipal court, showing that the defendant Mack, was not found nor that any attempt was made to serve him. The plaintiff, however, elected to proceed to trial against Trost and a trial

343 A. 644

1938

ALBERT BROWNE	ALBERT BROWNE
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Opinion filed June 30, 1938

MR. JUSTICE BRIDGES delivered the opinion of the

Court.

This is an action brought by the plaintiff, Albert Browne, against the defendant, Albert Browne and his wife, Mrs. Albert Browne, for damages.

and jointly.

The statement of claim filed charges that the plaintiff, Albert Browne, is the owner of a certain motor truck, for which he has paid a certain sum of money, and that the defendant, Albert Browne and his wife, have wrongfully taken possession of the same and are using the same for their own purposes.

It is shown that the defendant, Albert Browne and his wife, have wrongfully taken possession of the motor truck and are using the same for their own purposes, and that the plaintiff has suffered damages as a result thereof. The court finds that the defendant is liable to the plaintiff for the damages suffered by the plaintiff as a result of the defendant's wrongful taking and use of the motor truck.

was had before the court, without a jury, and there was a finding in favor of the plaintiff and against Trost for the sum of \$300.00, but the case was not dismissed as to the defendant Mack.

From the record it appears that the plaintiff, Jaspolis, was in the coal business and was desirous of buying a truck and that he called upon the defendants and had a talk with the defendant Mack, in regard to purchasing the truck, but was informed that it was in litigation at the time but that the litigation might be adjusted. He later bought a truck from other parties but testified that some time afterward Trost called on him and said he was now ready to sell the truck and that, if he could find a purchaser, he would give him a commission of \$300.00.

At the time plaintiff first saw the truck it was at a garage on Grand avenue, Elwood, Illinois, and remained there until after it was sold to a man by the name of Pfeifer. From the testimony it appears that this garage was operated by the Elwood Park Motor Sales Company, a corporation. After his conversation with these men he undertook to sell this truck for the defendants and called upon Pfeifer who examined the truck about the first of August. Pfeifer testified that the price was too high and that he did not purchase it, but that he later saw an advertisement in the paper and, in answer to it, went to the place stated in the advertisement and found that it was the same truck, concerning which the plaintiff had spoken to him. He purchased it in October of the same year for \$1900.00.

was held before the court, although a jury, and there was a finding in favor of the plaintiff and against the defendant for the sum of \$100.00, but the same was not delivered as to the defendant's work.

From the record it appears that the plaintiff, J. J. Smith, was in the meat business and was dealing in buying a truck and that he called upon the defendant and had a talk with the defendant's book, in regard to purchasing the truck, but was informed that it was in litigation at the time and that the litigation might be adjusted. He later bought a truck from other parties but testified that some time afterward the called on him and said he was ready to sell the truck and that, if he could find a purchaser, he would give him a commission of \$100.00.

It was then testified that the truck is now at a garage on Grand avenue, Chicago, Illinois, and remains there until after it was sold to a man by the name of Walter. From the testimony it appears that this man was operated by the plaintiff's sister, Mrs. J. J. Smith, a corporation. After the conversation with these men he understood to sell this truck for the defendant and called upon Walter who examined the truck about the time of August. Walter testified that the price was too high and that he did not purchase it, but that he later saw an advertisement in the paper and, in answer to it, went to the place stated in the advertisement and found that it was the same truck, concerning which the plaintiff had spoken to him. He purchased it in October of the same year for \$100.00.

There is considerable testimony as to whether the plaintiff was to receive a commission of \$300.00 or a certain amount in excess of \$2,500.00, but, for the purpose of this opinion, it is not necessary to discuss this testimony at length. The defendants insisted at the trial that the truck was the property of the Elmhurst Park Motor Sales Company, a corporation, and the testimony shows that Mack was the President and Trost the Secretary of that company. Counsel for the defendants upon the trial attempted to introduce testimony in their behalf, showing that Mack and Trost, in their conversations with the plaintiff, had stated to him that the truck was the property of the corporation, but an objection to this testimony was sustained by the court. We think this was error because if it was a fact that the corporation was the owner of the truck, and that fact was disclosed to the plaintiff, he, thereupon, had notice that Mack and Trost were dealing for the corporation and, in attempting to effect a sale must, necessarily, have been acting for it as its officers. Moreover, the plaintiff had already testified that he did not know that the owner was a corporation and the defendants had a right to meet this issue by their testimony.

The defendants further attempted to introduce testimony showing that they had inserted an advertisement in one of the daily papers of the city of Chicago for the purpose of showing that the sale was not produced by the plaintiff but, because of the advertisement. An objection to this testimony was sustained and a statement volunteered by the court that it did not consider that it was material whether the defendants

There is considerable testimony as to whether the plaintiff was to receive a commission of \$200.00 or a certain amount in excess of \$2,000.00, but for the purpose of this opinion, it is not necessary to discuss this testimony at length. The defendant insisted at the trial that the truck was the property of the defendant and not the plaintiff, and the testimony shows that this was the true state of facts and the testimony of that company. However, for the defendant upon the trial attempted to introduce testimony in their behalf, showing that the truck was the property of the plaintiff, but failed to do so. The court, in its opinion, was of the opinion that the property of the corporation, but in objection to this testimony was sustained by the court. We think this was error because it is not a fact that the corporation was the owner of the truck, and that fact was admitted by the plaintiff, he, therefore, had notice that fact and that fact was admitted for the corporation and, in attempting to admit a fact which, necessarily, was well known to all the officers. Moreover, the plaintiff had already testified that he did not know that the owner was a corporation and the defendant had a right to meet this issue by their testimony.

10 It did not consider that it was material whether the telephone
was installed and a statement volunteered by the court that
because of the advertisement. An objection to this testimony
showing that the sale was not produced by the plaintiff but,
the daily papers of the city of Chicago for the purpose of
money showing that they had inserted an advertisement in one of
THE CHICAGO TRIBUNE is identified as follows: 10-11-

advertised or not. This we believe was error. The defendants should have had a full consideration of their contention that Pfeifer had abandoned any idea of purchasing, by reason of his talk with the plaintiff, and was only induced to become a purchaser later, in October of the same year, when his attention was called to the truck by efforts of the defendants, themselves, in inserting the advertisement in the daily newspaper. While the cause was tried before the court, the presumption would be that it would consider only such evidence as was material, this rule would not apply under the circumstances because of the fact that the court specifically stated in ruling on the objection to this testimony, that it did not consider it material and that the cause should be tried on the issues. The remark of the court, at the time, sustaining the objection was as follows:

"No one asked you about an advertisement and it is immaterial in this case whether you had an "ad" in the paper. we are trying this suit on the issues."

From the foregoing remark we assume that the court did not give any consideration to the testimony of Pfeifer that it was because of the advertisement that he, Pfeifer, was caused to call upon the defendants in October sometime after his talk with the plaintiff. We believe this testimony should have been given consideration.

For the reasons stated in this opinion, the judgment of the trial court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

TAYLOR, P.J. AND BOLDON, J. CONCUR.

admitted or not. This we believe was proper. The Government
should have had a full consideration of their position and
whether they had abandoned any idea of punishing, or some of
the kind of punishment, and we have shown in the
previous report in January of the same year, when the attention
was called to the facts of the case of the Government, Government,
in looking at the Government in the same manner. We
the same we tried to find the truth, the Government would
be that it would consider only what was told us in the
this case would not apply under the circumstances because of
the fact that the Government was not willing to do
objection to this testimony, that it did not consider it
material and that the same should be ruled on the same.
The result of the case, at the time, considering the position
was as follows:

"We are asked for some an advertisement and
it is immaterial in this case whether you had an
ad in the paper, we are trying this case on the
facts."

From the foregoing report we assume that the court did not give
any consideration to the testimony of the witness that it was not
one of the circumstances that he, the witness, was asked to
tell after the testimony in the case was given. After the fact
with the result, we believe this testimony should have been
given consideration.
For the reasons stated in this opinion, the judgment
of the trial court is reversed and the same remanded for a
new trial.

REVEREND JUDGE HARRIS.

108 - 32584

CLINTON GLASS COMPANY,
a corporation,

Appellee,

v.

JUSTINA E. SCHARMER,

Appellant.)

APPEAL FROM

MUNICIPAL COURT
OF CHICAGO.

Opinion filed June 20, 1928.

MR. JUSTICE WILSON delivered the opinion of the court.

The statement of claim is based on a claim for merchandise, and labor expended, in making a certain art glass window at the request of the defendant, Justina E. Scharmer, for which said defendant refused to pay upon demand.

The affidavit of merits filed by the defendant charges that the art glass window in question was not constructed in accordance with the contract, by the plaintiff, Clinton Glass Company, a corporation, and further that it was not furnished until long after the period required by the contract.

The contract in question reads as follows:

"We propose to furnish and install in bronze frame, to be furnished by you, 1 Art Glass window about 28 x 36 for the sum of \$400.00.

This window to have ornamental jeweled border as selected by you today, as per sample submitted; the center landscape panel to be made by Derix Studio, Kevelaar, Germany.

Above window to be installed prior to the 30th day of May, 1928, subject to accidents in transportation.

Clinton Glass Co.,
Accepted Justina E. Scharmer."

The cause was tried by the court without a jury and resulted in a finding of the issues in favor of the plaintiff and against the defendant, assessing damages at the sum of \$400 and judgment was entered on the verdict.

From the testimony it appears that the rejection of said window was not based upon the fact that it was not delivered on or before May 30th, but the rejection appears to be based solely upon the ground that it was not constructed in accordance with the terms of the contract.

Defendant attempted to introduce testimony to the effect that the window should have been constructed of small pieces of colored glass closely leaded and it was further attempted to show that before the signing of the contract these matters were talked over by and between the plaintiff and the defendant, for the purpose of showing the intent of the parties. The court over objection ruled that the conversations preliminary to the signing of the agreement were not relevant and we believe justly so. The contract was not ambiguous and required no explanation. If it had been the purpose to require a particular kind of art glass window, it should have been incorporated into the contract. Oral testimony is admissible in certain instances where the terms of an agreement are ambiguous and it becomes necessary for oral testimony to explain the ambiguity. If it were permissible to permit testimony as to what was intended by written contracts, then written contracts would lose their entire force and effect.

Telluride Power Co. v. Crane Co., 206 Ill. 238.

The art glass window in question was in evidence be-

The same was filed by the court without a jury and awarded as a finding of the court in favor of the plaintiff and against the defendant, assessing damages of the sum of \$1000 and judgment was entered on the verdict.

From the testimony it appears that the defendant of said window was not based upon the fact that it was not delivered on or before May 1904, but the defendant sought to be based solely upon the ground that it was not constructed in accordance with the terms of the contract.

Following appeared in evidence testimony to the effect that the window should have been constructed of small pieces of colored glass closely joined and in one further attempt to show that before the signing of the contract these pieces were fitted into the window and the defendant, for the purpose of showing the intent of the parties, the court overruled the motion for judgment in favor of the plaintiff. The court was not satisfied that the window was not delivered as the contract was not delivered and it was not delivered. It is not from the evidence to be taken a material fact of the case, it should have been incorporated into the contract. Such testimony is admissible in certain instances when the fact of an agreement is undisputed and it becomes necessary for each party to explain the ambiguity. It is not possible to recall testimony as to what was intended by either party, then without evidence which has been given and allowed.

Testimony of J. H. Smith, Jr., for the plaintiff.

fore the court and considered by that court in its finding and we cannot say, in view of the fact that it is not before us as an exhibit, that that finding was contrary to the evidence.

The argument that the court permitted improper testimony to be admitted in evidence, is without force in view of the fact that the law presumes that the court considered only such testimony as was material and proper.

For the reasons stated in this opinion, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR, P.J. AND HOLDOM, J. CONCUR.

that the same was considered by the court in its finding
and no account was taken of the fact that it is not before
us as an exhibit, that that finding was contrary to the evidence.

The argument that the court's finding was
testimony to be admitted in evidence is without force in
view of the fact that the law requires that the same be considered
only such testimony as was received and given.

The reasons stated in this opinion, the judge
and of the majority being in effect.

Respectfully,
J. J. McLaughlin

THOMAS J. McLAUGHLIN, J. CLERK.

TONY MROZEK,
Appellant.

vs.

FRED A. RAUCH, Doing Business
as F.A. RAUCH & CO.,
Appellee.

APPEAL FROM COUNTY COURT
OF COOK COUNTY.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this appeal Tony Mrozek seeks to reverse an order of the County court of Cook county refusing to discharge him in a proceeding instituted pursuant to the Insolvent Debtors' Act and remanding him to the custody of the sheriff.

Tony Mrozek filed his petition in the County court of Cook county, in which he alleged that he had been arrested under a capias ad satisfaciendum issued out of the Municipal court of Chicago on a judgment against him in favor of Fred A. Rauch for the sum of \$500; that he was in the custody of the bailiff by virtue of the writ and was desirous of being released from arrest upon delivering up his property. Rauch filed a plea to the petition, in which he averred that Mrozek was not entitled to his discharge because the judgment on which the capias issued was rendered in a suit in which malice was the gist of the action.

On the trial the pleadings filed in the Municipal court case and the record in that proceeding were introduced in evidence. That was an action of replevin brought by Fred A. Rauch against Tony Mrozek and John Felit to recover the possession of an automobile truck. The truck not having been taken on the writ, plaintiff filed a count in trover in which he alleged that the owner of the truck being indebted to him in the sum of \$2500, executed his note for that amount secured by a chattel mortgage on the truck;

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THE COURT OF APPEALS
IN THE CITY OF LOS ANGELES

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff,
vs.
JOHN A. BROWN,
Defendant.

THE COURT OF APPEALS, IN THE CITY OF LOS ANGELES.

On this motion, the court is asked to grant a writ of habeas corpus to the defendant, John A. Brown, who is now in custody of the Sheriff of the County of Los Angeles. The defendant claims that he is innocent of the crime charged against him, and that he has been wrongfully detained. He also claims that he has been denied the right to a fair trial, and that he has been subjected to cruel and unusual punishment.

At the trial, the defendant was charged with the crime of murder. The evidence against him was circumstantial, and the jury was instructed to find him guilty if they believed the evidence beyond a reasonable doubt. The defendant claims that the evidence was insufficient to support the verdict, and that the jury was misled by the prosecutor's arguments. He also claims that he was denied the right to a fair trial, and that he was subjected to cruel and unusual punishment.

On this motion, the court is asked to grant a writ of habeas corpus to the defendant, John A. Brown, who is now in custody of the Sheriff of the County of Los Angeles. The defendant claims that he is innocent of the crime charged against him, and that he has been wrongfully detained. He also claims that he has been denied the right to a fair trial, and that he has been subjected to cruel and unusual punishment.

that he sought to take possession of the truck and foreclose the chattel mortgage, but found that the truck was in the hands of Tony Mrozek and John Polit, who well knew of the existence of the chattel mortgage prior to and at the time they obtained the truck, and knew that plaintiff was entitled to its possession by virtue of his chattel mortgage; that he demanded the truck but they refused to deliver it to him. There was a further allegation that Mrozek and Polit "fraudulently, wrongfully, wilfully, tortiously and maliciously converted" the truck, "with the intent to cheat and defraud plaintiff of his property." The defendants filed an affidavit of merits in that case denying that they "fraudulently, wrongfully, wilfully, tortiously and maliciously converted" the truck "with intent to cheat and defraud the plaintiff." That suit was dismissed as to Polit and the record in that case then discloses that the case went to trial before the court without a jury, both parties being represented, and after the evidence was heard the court found the defendant Tony Mrozek was "guilty of having maliciously, wilfully and intentionally and with intent to injure and defraud the plaintiff" converted to his own use the automobile truck, damages were assessed at \$500 and judgment for that amount was entered.

If malice was the gist of the action in the Municipal court, then plaintiff was not entitled to his discharge and the judgment of the County court in remanding him to the custody of the sheriff was right; but if malice was not the gist of that action, then he should have been discharged. In Jernberg v. Nix, 198 Ill. 254, which was a proceeding under the Insolvent Debtors' Act, the court said (p. 256): "The term 'malice' as used in the act in question, applies to that class of wrongs which are inflicted with an evil intent, design or purpose. It implies that the guilty party was actuated by improper or dishonest motives, and requires the in-

that he sought to take possession of the truck and contents of the
checked mortgage, but found that the same was in the hands of
Tany Kresch and John Wells, who well knew of the existence of the
checked mortgage prior to and at the time they obtained the truck,
and knew that plaintiff was entitled to its possession by virtue
of his checked mortgage; that he demanded the truck but they re-
fused to deliver it to him. There was a further allegation that
Kresch and Wells "intentionally, wrongfully, maliciously,
and maliciously converted" the truck, "with the intent to cheat and
defraud plaintiff of his property." The defendant filed an affi-
davit in reply to that said answer that says "intentionally,
wrongfully, maliciously, and maliciously converted" the
truck "with intent to cheat and defraud the plaintiff." That said
was dismissed as to Wells and the reason in that case was also
given that the case went to trial before the court without a jury,
both parties being represented, and that the evidence was before the
court from the defendant Tany Kresch was "guilty of having malici-
ously, wrongfully and maliciously and with intent to injure and
defraud the plaintiff" converted to his use the automobile
truck, and was assessed at \$500 and judgment for that amount
was entered.

It appears that the kind of the action in the municipal
court, then plaintiff was not entitled to his discharge and the
judgment of the county court in remanding him to the custody of the
sheriff was right; but it appears that the kind of that action,
then he should have been discharged. In Johnson v. City of St. Louis,
251, which was a proceeding under the Insolvent Debtor's Act, the
court said (p. 252): "The term 'malice' as used in the act in
question, implies no less a state of wrong than that are imputed
an evil intent, desire or purpose. It implies that the guilty party
was actuated by improper or dishonest motives, and requires the in-

tentional perpetration of an injury or a wrong on another." The gist of an action is the essential ground or principal subject matter without which the action could not be maintained."

There being but one count or charge made in plaintiff's statement of claim in the Municipal court, whether malice was the gist of that action must be determined from the inspection of the record, and if it appears from the pleadings there filed that malice was the gist of that action, the judgment there rendered is res judicata of that matter. Jernberg v. Mix, supra; Seney v. Knight, 292 Ill. 306. And while there are some actions of trover in which the courts have held that malice was not the gist of the action (Jernberg v. Mix, supra), it has been held that a declaration in an action for trover may be so drawn that malice will be the gist of the action. In Seney v. Knight, supra, the court said (p. 309): "It is earnestly contended by appellants that this is an action in trover; that the gist of such action is the unlawful conversion of the property, and that under no circumstances can malice become the gist of an action in trover. It is also contended that malice cannot be the gist of any action where the cause is brought as a first-class case in the municipal court." "It is true that this proceeding in the municipal court is similar to the common law action of trover, but, regardless of its technical name, there is nothing to prevent malice being the gist of this action if it is properly pleaded." The Seney case was prosecuted in the County court under the Insolvent Debtors' act and the causes in that case was issued under a judgment rendered in the Municipal court. The statement of claim there filed in the Municipal court charged the defendants with having "wilfully, maliciously, tortiously and fraudulently converted certain bonds and notes of the value of \$60,000 to their own use, for the purpose and with the intent to

cheat and defraud him of his property. The jury by their verdict found appellants guilty of having wilfully, maliciously, tortiously and fraudulently converted appellee's property to their own use with the intent to cheat and defraud appellee, and assessed appellee's damages at \$58,600."

It will be noted that the allegation in the statement of claim filed in the Seney case and the finding of the jury are almost identical with the allegations of the statement of claim filed in the Municipal court and the finding of the trial Judge is substantially the same as the finding of the jury in the Seney case. We think the Seney case cannot be distinguished from the case at bar, and therefore the order of the County court of Cook county must be affirmed.

Complaint is made that the court erred in failing to permit Krozek to offer evidence tending to show that malice was not the gist of the action in the Municipal court. But as we have above stated, that matter was to be determined alone by an inspection of the pleadings filed in that court. Nor is there any merit in the contention that there was a fatal variance in the Municipal court proceeding because the action there was instituted against Krozek and Polit, and although the suit was dismissed as to Polit, the statement of claim was not changed to meet that situation. The judgment of the Municipal court cannot be thus collaterally attacked.

The order of the County court of Cook county is affirmed.

AFFIRMED.

Hatchett, P. J., and McGuire, J., concur.

[illegible]

It will be noted that the allegation in the statement
of claim filed in the Benny case was the finding of the jury was
almost identical with the allegations of the statement of claim
filed in the Munich case and the finding of the trial judge in
that case was also in favor of the Benny.
The Benny case would be distinguished from the
case at bar, and therefore the order of the County Court of Cook
County must be affirmed.

[illegible]

10-10-1964

Layer 11

[illegible]

THE NEWTON & HOIT COMPANY,
a Corporation, Appellant,

vs.

SIMON W. STRAUS, SAMUEL J. T.
STRAUS, SIDNEY H. CAHN, Copartners
Doing Business under the name and
style of S. W. STRAUS & CO.,
Appellees.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against the defendants to recover \$11,996, with interest thereon claimed to be due under the terms of a written agreement entered into between the parties. At the close of the evidence there was a directed verdict in favor of the defendants and plaintiff appeals.

The record discloses that in October, 1923, A. Irving Jordan was contemplating constructing an apartment hotel in Chicago and to do so it was necessary for him to borrow money; that on October 20, 1923, he entered into a written contract with the defendants whereby he was to borrow from them \$675,000, to be evidenced by a bond issue secured by a trust deed on the hotel property. Afterwards, on March 20, 1924, Jordan entered into a written contract with plaintiff for the purchase of furniture to be installed in the hotel at the price of \$47,635.50; this contract was modified on June 2, 1924, so that the cost of the furniture which plaintiff agreed to sell Jordan was increased to \$48,568.50. Delivery of the furniture was to be on or before September 1, 1924.

On May 26, 1926, plaintiff wrote a letter to the defendants, which letter is the basis of this suit, plaintiff's contention being that this letter was executed under such circumstances as to be a binding contract between it and the defendants, while the defendants' position is that the letter affected them in no way -

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WILLIAM W. WILSON

CHIEF OF BUREAU

THE BUREAU OF THE
FEDERAL BUREAU OF INVESTIGATION
WASHINGTON, D. C.

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ALSO, BUREAU OF THE
FEDERAL BUREAU OF INVESTIGATION
WASHINGTON, D. C.

WILLIAM W. WILSON, CHIEF OF BUREAU

Plaintiff brought an action against the defendant in
February 1938, with interest thereon claimed to be due under the
terms of a written agreement entered into between the parties. At
the time of the evidence there was a closing account in favor of
the defendant and plaintiff.

The record shows that in October, 1937, A. Wilson,
plaintiff, was authorized to investigate an account in which
he was to be interested for his own private account. This was done
by the defendant in a written agreement with the plaintiff
which was signed by the defendant on October 19, 1937, to be witnessed by a
notary public and a third party in the public presence. After

the date of the agreement, the plaintiff was authorized to be interested in
the account of the price of \$47,500.00; this contract was modified
on June 2, 1938, so that the price of the account was plaintiff
agreed to sell to the defendant for \$48,500.00. Delivery of the
account was to be on or before September 1, 1938.

On May 22, 1938, plaintiff wrote a letter to the defendant,
in which letter he stated that he was interested in the account
and that this letter was executed under such circumstances
as to be a binding contract between him and the defendant, while the
defendant's position is that the letter attested to him in no way.

that they were not a party to it.

The written contract entered into between Jordan and the defendants provided, inter alia, that the defendants should disburse the moneys as the construction of the building progressed, and that they were to receive the sum of \$100,000, out of which the cost of the furniture and furnishings of the new hotel might be paid; that Jordan should obtain and furnish defendants with waivers of lien; that the defendants might pay the money direct to Jordan or to the contractor, subcontractor or materialsman, and that they should not be required to look to the application of the purchase money; that the payments might be made at such times and in such instalments and upon such terms and conditions as the defendants should determine, and that the defendants might apply a part of the \$100,000 toward the cost of the completion of the building; that if Jordan entered into an agreement for the furnishing of the hotel as the defendants might approve, costing not less than \$100,000 "free of all liens or claims for lien or reservations of title for any part of the contract price of said furnishings," the \$100,000 reserved might be reduced to \$50,000 so that part of that sum might be used by Jordan to pay for the building; that any contract entered into between Jordan and the party agreeing to furnish the hotel should be assigned to the defendants and so drawn as to make it directly enforceable by them, and "The purchaser may require absolute bills of sale or other evidence of unencumbered title to said furnishings as a condition precedent to the release of any portion of the \$100,000;" that payments from this fund might, at the defendants' option, be made by them directly to the party furnishing the hotel.

On January 2, 1924, Jordan executed a trust deed to Melvin L. Straus to secure the bond issue, which was also acknowledged as a chattel mortgage covering the furnishings to be installed in the hotel. April 30, 1924, Jordan made a chattel mortgage describ-

that they were not a party to it.

The written contract entered into between Jordan and the defendant provided, in part, that the defendant should pay the money on the completion of the building operations, and that they were to receive the sum of \$100,000, out of which the cost of the furniture and furnishings of the new hotel might be paid. Jordan should obtain credit and furnish furniture with interest at 10%; that the defendant might pay the money direct to Jordan or to the defendant, as might be determined; but that they should not be required to look to the completion of the building work; that the defendant might be made at such time and in such instalments and upon such terms and conditions as the defendant should determine, and that the defendant might apply a part of the \$100,000 toward the cost of the completion of the building; that if Jordan entered into an agreement for the furnishing of the hotel as the defendant might approve, nothing was to be paid for "two of all items or claims for items or reservations of items for any part of the contract price of said building," the \$100,000 received might be reduced to \$50,000 or less and at that time might be paid by Jordan to the defendant, and the defendant might pay into between Jordan and the party assigned to Jordan the hotel should be assigned to the defendant and as shown on its books it directly attributable by them, and the defendant may require the defendant of sale of such evidence of unaccomplished items to said two-thirds as a condition precedent to the release of any portion of the \$100,000; that payments from said hotel might, at the defendant's option, be made by them directly to the party furnishing the hotel. On January 7, 1934, Jordan executed a first deed to Melvin L. Brown to secure the first loan, which was then acknowledged as a chattel mortgage covering the furnishings to be installed in the hotel. April 20, 1934, Jordan made a chattel mortgage securing

ing the same furniture and furnishings as those mentioned in the contract of March 20th between Jordan and the plaintiff.

On March 20, 1924, plaintiff wrote a letter to Jordan proposing to install the furniture in the hotel, which letter contained the following: "It is further understood and agreed that when signed by you this proposal constitutes a contract." At the bottom of the letter the following appears: "I heraby accept the above proposal subject to the terms and conditions named therein. Subject to final selection by April 16th, '24. A. F. Jordan." That contract provided for the delivery of the furniture on or before September 1, 1924, and the terms of payment were "35% of the total value of any furniture delivered under this contract is to be paid for in cash within ten (10) days after delivery and for the remaining 65% you are to execute three notes in equal amounts, the first coming due in four (4) months, the second in eight (8) months and the third in twelve (12) months. Said notes to bear interest at the rate of 6% per annum."

The evidence further shows that about May 26, 1924, Jordan and J. J. Moran, an employee of defendants, saw Herbert A. Friedlich, an attorney for defendants, and asked him to prepare a letter, which he did, as follows:

"S. W. Straus & Company,
6 North Clark Street,
Chicago, Illinois.

Dear Sirs: We have agreed to sell, deliver and install, for A. Irving Jordan, certain goods, wares and merchandise to be used in the Hotel Aragon, now being constructed at the southeast corner of Fifty-fourth street and Cornell avenue, Chicago, Illinois. A copy of our agreement to sell said goods, wares and merchandise is hereto attached. We have agreed to sell, deliver and install the goods, wares and merchandise described in said agreement at the prices set out in said agreement, and deliver and install all of said goods, wares and merchandise in said Hotel Aragon on or before September 1, 1924.

We shall deliver and install all of said goods, wares and merchandise in said Hotel Aragon free and clear of any and all liens and encumbrances of any kind or character whatsoever, and we consent to and have notice of, giving of a first and paramount chattel mortgage on said goods, wares and merchandise, as part

security for the payment of first mortgage bonds of said A. Irving Jordan, in the aggregate principal amount of Six Hundred Seventy-five Thousand Dollars (\$675,000), which said first chattel mortgage shall be prior to any claim which we have, or may have (including vendor's lien), on any of said goods, wares and merchandise. We further agree not to seek to enforce any payments due under the terms of said agreement, in any manner or at any time, against any of said goods, wares and merchandise. We further agree to look solely to the credit of said A. Irving Jordan for the payment of any and all amounts due upon said goods, wares and merchandise (except Sixteen Thousand Nine Hundred Ninety-six (\$16,996) Dollars, whether said amounts are due in cash or in notes, and the failure of said A. Irving Jordan to make any of the payments provided to be made in said agreement (except Sixteen Thousand Nine Hundred Ninety-six (\$16,996) Dollars, or to execute and deliver the notes or any of them, provided for in said agreement, or to perform any other of the provisions set out in said agreement, shall not delay or interfere with the sale, delivery and installation of any of said goods, wares and merchandise, as in this letter provided for, the undersigned, agreeing to sell, deliver and install all of said goods, wares and merchandise in said Hotel Aragon, free and clear of any and all liens and encumbrances, whether or not at the time of delivery and installation are due hereunder any of the provisions of said agreement have been complied with by said A. Irving Jordan (except the payment of Sixteen Thousand Nine Hundred Ninety-six (\$16,996) Dollars.)

The above is conditioned upon the payment to us of Sixteen Thousand Nine Hundred Ninety-six Dollars (\$16,996) within ten (10) days after installation as aforesaid, of all said goods, wares and merchandise. The obligations expressed in this letter shall be binding upon us from and after the date of delivery of this letter and we shall be discharged from such obligations only in the event that we shall not receive said payment of Sixteen Thousand Nine Hundred Ninety-six (\$16,996) Dollars, as aforesaid.

We have knowledge that one of the inducements for your entering an agreement to purchase said first mortgage bonds was the representation by said A. Irving Jordan that he would obtain an agreement, with terms as above, from the persons selling such goods, wares and merchandise. We have knowledge also that you have purchased for resale said first mortgage bonds referred to above, and that you have set apart out of the net proceeds of the purchase price thereof sufficient moneys to pay for all of said goods, wares and merchandise, and that in reliance upon the agreement herein contained you will permit a part of the moneys so set apart to be used for other purposes than for the payment of the goods, wares and merchandise hereinabove referred to.

This letter is written to induce you to make said payment of Sixteen Thousand Nine Hundred Ninety-six Dollars (\$16,996) as aforesaid, and to induce you to permit the use of said money for such other purposes.

Yours very truly,
The Newton & Heit Company,
By J. R. Newton,
Its President."

It further appears that although this letter was dated May 26, 1924, Straus & Co. did not send it to Jordan until June 19,

[illegible][illegible]

May 20, 1954, Bureau of the Army and Navy, Washington, D. C.

1924, on which date it was enclosed with a letter to Jordan and mailed to him with the following letter: "We are handing you herewith original and duplicate of letter which should be signed by Newton & Hoyt. Will you please see that a copy of the revised contract and revised specifications are attached at the time this letter is signed?" This letter was signed by Moran and the defendants and on the same day, June 18, 1924, Jordan wrote plaintiff the following letter: "I am enclosing herewith letter in duplicate received from S. W. Straus & Company, which shows the revised figures. If you will sign the original and duplicate and mail back to me, I will deliver it to them. They also request that a copy of the revised contract and revised specifications be attached at the time the letter is signed. Will you kindly take care of this?"

It appears that upon receipt of this letter together with the letter of May 26, 1924, to which had been attached the written contract, as revised, between Jordan and the plaintiff, plaintiff signed the letter of May 26th and gave it to Jordan, who delivered it to the defendants.

Afterwards, about September 1, 1924, plaintiff installed the furniture in the hotel, and five days afterwards, September 8th, Jordan paid plaintiff \$5,000 on account. The evidence further shows that the defendants began to make payments on account of the construction of the building, beginning about the first of the year 1924 and ending December 26, 1925; that on September 3, 1925, they paid Jordan \$8,000 and after that date and during the balance of that year made six other payments aggregating nearly \$20,000, which was paid to Jordan direct, the last payment being made December 26, 1925. This was the final disbursement made by the defendants and the evidence shows that the entire \$675,000 had been disbursed by the defendants, nothing remaining in their hands.

Plaintiff contends that it was the duty of the defendants to notify plaintiff, within a reasonable time after the receipt by them of the letter of May 26, 1934, that they would not be bound by the terms of that letter, and since defendants did not do so and made no reply to the letter, that under the law "defendants' silence constituted an acceptance of the offer and the consummation of a contract with plaintiff;" that the failure of defendants to notify plaintiff that they did not intend to accept the offer contained in the letter of May 26th was an acceptance "by silence" of the offer and that in accordance with the terms of the letter defendants were bound to pay plaintiff the cash payment of \$16,996 on account of the furniture installed, less the \$5,000 which it had received from Jordan. On the other hand, defendants' position is that they were not a party to the letter and that plaintiff was in no way affected by the letter, because plaintiff was bound to install the furniture under its written contract with Jordan, and that the letter did not change this contract.

Plaintiff alleged in its statement of claim that the letter was prepared and executed at the request of the defendants and this point is stressed throughout the argument made in its written brief. On the other hand, the defendants in their affidavit of merits deny that they were desirous of obtaining this letter, but aver that Jordan was desirous of obtaining it so that part of the \$100,000 fund reserved for payment of the furniture might be released to him and be used in payment of the cost of the building and that Jordan caused plaintiff to execute the letter. Neither party produced any evidence to sustain the allegations mentioned. Although Jordan was called on a witness by plaintiff and testified, he was not asked any question on this point, nor was he asked any question on this subject by counsel for the defendants; so there is no evidence as to who caused the execution and delivery of the letter, the only evidence on this subject

Plaintiff contends that it was the copy of the letter made in early January, 1934, which was furnished to the defendant by them of the letter of May 26, 1934, that they could not be bound by the terms of that letter, and since defendant did not do so and made no reply to the letter, that under the law "defendant's silence constituted an acceptance of the offer and the assumption of a contract with plaintiff"; that the failure of defendant to notify plaintiff that they did not intend to accept the offer contained in the letter of May 26th was an acceptance "by silence" of the offer and that in accordance with the terms of the letter defendant were bound to pay plaintiff the cash payment of \$10,000 on account of the furniture installed, less the \$2,500 which it had received from Jordan. In the other hand, defendant insisted in that they were not a party to the letter and that plaintiff was to be repulsed by the letter, because plaintiff was bound to install the furniture under the written contract with Jordan, and that the letter did not change this contract. Plaintiff alleged in the statement of claim that the letter was prepared and executed at the request of the defendant and this point is stressed throughout the argument made in the written brief. On the other hand, the defendant in their written statement of defense deny that they were desirous of obtaining this letter and aver that Jordan was desirous of obtaining it so that part of the \$10,000 would be reserved for payment of the furniture might be referred to him and be used in payment of the cost of the furniture and that Jordan caused plaintiff to execute the letter. Neither party produced any evidence to sustain the allegations mentioned. Although Jordan was called as a witness by plaintiff and testified, he was not asked any question on this point, nor was he asked any question on this subject by counsel for the defendant; so there is no evidence as to the manner the execution and delivery of the letter, the only evidence on this subject

being that Jordan and Moran requested Friedlich, the attorney for the defendants, to prepare the letter, which was done, and nearly a month later it was mailed to Jordan by the defendants, presented by him to plaintiff, who signed it and then returned by Jordan to the defendants.

Counsel for the plaintiff contend that plaintiff by executing the letter of May 26th gave up and surrendered its right to enforce payment against the furniture, and on this point counsel in their brief say: "Although ^{under} the contract between plaintiff and Jordan the plaintiff had not reserved any lien of any kind as security for the payment of the purchase price, but had provided for giving Jordan credit for the payment thereof, nevertheless plaintiff still had protection by way of a lien perfected under the mechanic's lien law, which lien would have been prior to any lien which defendants could secure by means of a chattel mortgage from Jordan on said property delivered by plaintiff to the Hotel. By the letter, however, plaintiff expressly consented to the priority of defendants' lien under the chattel mortgage from Jordan;" that the defendants were greatly interested in seeing that the bond issue purchased by them from Jordan was a first lien on the furnishings, and continuing say: "If no such agreement were made with defendants, plaintiff could have levied execution, on a judgment secured against Jordan, against this property in the hotel."

On the other hand the defendants' position is that the defendants gave plaintiff nothing by the execution of the letter; that by the terms of the written contract between Jordan and plaintiff, the latter was required to install the furnishings in the hotel and could not, under the contract, demand the cash payment of 33% until ten days after the furniture was installed in the hotel; and that the trial court observed in deciding the case that "the letter was no more than a recitation of the terms of the agree-

Before that letter was taken possession of, the plaintiff
the defendant, he signed the letter, which was then, and usually
a month later it was called to Jordan by the defendant, presented
by him to plaintiff, who signed it and then returned by Jordan to
the defendant.

Concerning the plaintiff's contention that plaintiff by
presenting the letter of May 23rd gave up and surrendered the right
to recover payment against the defendant, and on this point plaintiff
is not in dispute. Plaintiff, however, has insisted that plaintiff was
Jordan the plaintiff had not received any item of any kind or value
except for the payment of the purchase price, but had provided for
Jordan's claim against the defendant, and that plaintiff's claim
still will not be protected by way of a lien perfected under the

defendant's lien law, which lien would have been prior to any item
which defendant could secure by means of a charged mortgage from
Jordan on said property delivered by plaintiff to the hotel. By
the letter, however, plaintiff expressly consented to the priority
of defendant's lien under the charged mortgage from Jordan; and

the defendant was expressly interested in seeing that the bank
last mentioned by Jordan had a first lien on the property
and, accordingly says: "It is now apparent that the bank's
lien, which plaintiff could have failed execution, on a judgment or
order against Jordan, against this property in the hotel."

On the other hand the defendant's position is that the
defendant gave plaintiff nothing by the execution of the letter;
that by the terms of the written contract between Jordan and plain-
tiff, the latter was required to install the machinery in the
hotel, and that the defendant, under the contract, should have
of the hotel soon after the machinery was installed in the
hotel; and that the trial court observed in deciding the case that
"the letter was no more than a recitation of the terms of the agree-

ment which plaintiff had with Jordan."

Counsel for plaintiff do not point out how plaintiff could obtain a mechanic's lien on the furniture installed in the hotel if it had not executed the letter of May 26th, and we know of no way it could be done. On the contrary, we think that the bond issue was a first prior lien and in fact the only lien on the furniture installed, because it was expressly covered by Jordan's chattel mortgage on it to the defendants, of which fact plaintiff was aware because the chattel mortgage was recorded. This fact also shows that any judgment plaintiff might have obtained against Jordan could not be satisfied by a levy of an execution on the furniture, except subject to defendants' lien.

Upon a careful consideration of all the evidence we are unable to say that plaintiff did or was required to do anything by reason of its execution of the letter of May 26th that it was not required to do under its contract of March 20th with Jordan. Under its contract with Jordan the 35% payment on the furniture was not due until ten days after it was installed in the hotel and under the terms of the letter of May 26th plaintiff's offer, if it may be considered as such, was upon condition that the 35% be paid within ten days after it was installed, as required by its contract of March 20th. If this payment had not been made, then plaintiff was relieved of its obligation, if any, under the letter of May 26th. No claim is made by the plaintiff that the defendants expressly agreed to pay the 35% to it, but its contention is that this obligation arose by the silence of the defendants in failing to notify plaintiff, within a reasonable time, that they would not be bound by the letter of May 26th. Moreover, we think the construction which we have placed on the letter of May 26th is borne out by the conduct of plaintiff. Although it alleged in its statement of claim that it had demanded payment of the defendants, yet no proof

was made of this allegation and no demand appears to have been made except the filing of the suit, which was about eighteen months after the 35th should have been paid to it. Plaintiff must have known that the defendants were disbursing the money and if it, at that time, thought that the defendants were liable to it under the letter of May 26th, it should have demanded payment, as the defendants had at that time and for a considerable period thereafter, in their possession, more than sufficient to pay plaintiff's demand. Moreover, we think the letter of May 26th ought not to be so construed as to change or modify the contract entered into between Jordan and the defendants for the purchase and sale of the bond issue, because Jordan would be affected if plaintiff's contention was correct, although he was not a party to the letter. His rights could not be affected by any contract entered into between plaintiff and the defendants.

The judgment of the Municipal court of Chicago is affirmed.

AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

was made in this direction and no further progress in that direction
was made except the filing of the suit, which was about thirteen
months after the suit was filed in 1911. Plaintiff was
then known that the defendants were discharging the duty and it
is at that time, however, that the defendants were liable to it
under the latter of the two, it being the defendant's duty
the defendants at that time and for a considerable period
thereafter, in their possession, were then obligated to pay
Plaintiff's demand. However, we find that prior to May 1912
there was no payment made as to either of either the defendant
entered into business with the defendant in the purchase
and sale of the bond issue, because Jordan would be affected by
Plaintiff's contract was rejected, although he was not a party to
the latter. The same would not be affected by any contract entered
into later between Plaintiff and the defendant.

The judgment of the Municipal Court of Chicago is
affirmed.

Very respectfully,
J. J. McLaughlin, Clerk.

Submitted at Chicago, Ill., this 1st day of May, 1912.

Attest: J. J. McLaughlin, Clerk.

Filed for record this 1st day of May, 1912.

Witness my hand and seal of office this 1st day of May, 1912.

John J. McLaughlin, Clerk.

CHICAGO TITLE AND TRUST COMPANY,
Appellee.

vs.

GEORGIANA DE LASAUX et al.
On Appeal of GEORGIANA DE LASAUX,
Defendant Below, Appellant.

F. W. HARGH, Jr.,
Defendant Below, Appellee.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this appeal the defendant Georgiana De Lasaux seeks to reverse a decree of the Superior court of Cook county.

The complainant, the Chicago Title and Trust Company, filed a bill of interpleader in which it alleged, inter alia, that a written contract, entered into between T. C. Windham and the defendants Georgiana Delasaux and Edward Delasaux, had been placed in escrow with it by the parties and that the \$1,000 earnest money mentioned in the contract was also held by it in escrow. The contract was the ordinary real estate contract, whereby Windham agreed to buy and Georgiana Delasaux and her husband agreed to sell a certain piece of real estate for \$36,000, \$13,000 of which was to be secured by a first mortgage, \$1,000 paid as earnest money, \$12,000 at the time the deal was closed, the remaining \$10,000 to be secured by a second mortgage. It further appeared that the deal had been consummated and it was alleged that certain real estate brokers were claiming the \$1,000 earnest money as their commissions; that one of the brokers had obtained a judgment in the Municipal court of Chicago for his commissions against the defendant Blanche Woodward and had garnished the complainant and the prayer was that the defendants be required to interplead, that complainant be awarded its costs and expenses out of the \$1,000, and that it pay the balance

2491A.045

BY ORDER OF THE COURT

IN COMMON COUNCIL

EDWARD L. LEE AND OTHERS, PLAINTIFFS,

VS.

EDWARD L. LEE AND OTHERS, DEFENDANTS.
On appeal of EDWARD L. LEE AND OTHERS.
Defendants below.
Appealing.

W. W. LAMB, JR.,
Defendant below.

Attorney.

IN WITNESS WHEREOF, I have hereunto set my hand and the seal of the Court at Chicago, Illinois, this 1st day of January, 1900.

By this appeal the defendant George W. Leland

seeks to reverse a decree of the Superior Court of Cook County.

The complaint, the Chicago Title and Trust Company, filed a bill of interpleur in Cook County, Illinois, and

a written contract, entered into between T. S. Winchell and the defendant George W. Leland and Edward Leland, had been filed in

County also it is by the parties and that the \$1,000 current money

remained in the contract was also paid by it in cash. The con-

tract was the subject of a writ of habeas corpus, which was issued to the

defendant George W. Leland and his heirs and assigns to sell a cer-

tain piece of real estate for \$50,000, \$15,000 of which was to be

secured by a first mortgage, \$1,000 paid in current money, \$11,000

at the time the deed was given, the remaining \$10,000 to be secured

by a second mortgage. It further appears that the deed had been

conveyed and it was alleged that certain real estate interests were claimed the \$1,000 current money as well as commissions; that one of the parties had obtained a judgment in the superior court of Chicago for his commissions against the defendant Edward W. Leland and had demanded the commission and the money was that the defendant be required to interpleur, that commission be awarded the costs and expenses out of the \$1,000, and that it pay the balance

into court or to whomever it should be decreed to be due.

The defendants filed answers. The cause was referred to the master who took the evidence and made up his report. He found that the complainant was entitled to deduct \$150 under the escrow agreement for its costs and charges and that the remaining \$850 be paid to the defendant Marsh as his commissions. It was further decreed that Marsh be enjoined from further prosecuting the suit in the Municipal court against Woodward.

The record discloses that the defendant Georgiana DeLassaux owned a piece of real estate and had given a power of attorney to the defendant Blanche Woodward to sell the same; that on November 19, 1924, the written contract for the purchase and sale of the property above mentioned was executed by the vendors by Blanche Woodward, their attorney in fact. It was the ordinary real estate contract and provided that if the purchaser failed to perform promptly, the \$1,000 earnest money might be retained by the vendors as liquidated damages and the contract be null and void. It further provided that the contract and earnest money should be held by the complainant for the mutual benefit of the parties, and that if the earnest money should be retained on account of the failure of the purchaser to perform his part, then the complainant should apply the earnest money to the payment of any expenses incurred by the seller or vendor and the balance be retained as liquidated damages. It then contained the following: "Brokers commission to be paid to W. W. Marsh, Jr. of 3% on sale price." It further appears from the record that the deal was consummated and the purchase money paid to the vendors except the \$1,000 earnest money deposited with complainant; that afterwards Marsh brought an action in the Municipal court of Chicago against Blanche Woodward, the attorney in fact, claiming 3 per cent of the sales price of \$36,000, or \$1080 for his services in securing a

purchaser for the property, and obtained judgment by default against her; that he afterwards garnisheed the complainant, seeking to obtain satisfaction of his judgment by means of the \$1,000 deposited with complainant; that upon a hearing on that matter the garnishee, the complainant here, was discharged. It further appears that the vendor of the property paid to the defendant Charles E. Whitstead \$350 which he claimed was commission due him for the sale of the property in question, he claiming that more was due him. As stated, the court awarded the complainant \$150 on account of its services in the matter, which was in accordance with the stipulation of the parties, and decreed that the \$350 be paid to defendant Marsh for his commission, finding that he had sold the property.

The vendor Georgiana Delaseaux appeals, contending that the decree should be reversed because the defendant Marsh by bringing an action in the Municipal court against Blanche Woodward for his services in the matter and by obtaining a judgment in that court, is estopped from now claiming the \$350 of the earnest money. With this contention we are unable to agree. Marsh had been enjoined by the decree in the instant case from further prosecution of the Municipal court action. Obviously he had no right of action against Woodward, who was but the attorney in fact of the owners of the property, as was disclosed in the contract for the purchase and sale of the property, by reason of which contract Marsh claimed he was entitled to his commissions. He has been paid no part of the judgment of the Municipal court, and since he has been enjoined from further proceedings in that matter, he can receive no satisfaction in that case. Obviously, Marsh could not maintain any action on the contract entered into between the vendors and vendee for the purchase and sale of the real estate, he not being a party to that contract. Rushkiewicz v. St. George.

296 Ill. App. 210. Under that contract he could have no claim to the earnest money unless the purchaser failed to perform his part of the contract, and since the evidence discloses that the contract was consummated, no right of action based upon the contract was in Harsh. As disclosed by the testimony of Enoch Odarich, Harsh's contract for compensation was an oral one made between him and the vendors' agent and attorney in fact, Blanche Woodward, whereby it was agreed that in case he found a purchaser for the property he would be paid a broker's commission of 3 per cent. But this contention was not made in the trial court nor is it made here.

Defendant DeLasaux further contends that since it was stipulated on the trial that the \$1,000 earnest money belonged to the vendor, Georgiana DeLasaux, the decree was wrong in not awarding the \$850 to her. But we think this is too narrow a view to take of all the evidence. While it was stipulated as above stated, yet when all the evidence is considered it shows that Harsh was claiming this money as his commissions, and the master found, and the decree approved his finding, that Harsh had obtained the purchaser for the property and was entitled to the commissions.

A further point is made that the court was without jurisdiction to enter the decree, but we think the defendant Georgiana DeLasaux, who makes this point, cannot, for the first time, be permitted to make such contention here. In her answer to complainant's bill she prayed that the \$1,000 "after deducting the amount of said reasonable costs and charges of complainant therefrom, shall, by order of this honorable court, be paid to said defendant Georgiana DeLasaux." Having taken that position in the pleadings and on the trial, she will not now be permitted to shift her position in this court and contend that the court

was not warranted in making a disposition of the money.

Under the pleadings and on the trial the sole question in controversy was whether Harsh had sold the property and was entitled to his commissions. Harsh and one of his employees testified. No one testified on behalf of any other of the defendants. The testimony of these two witnesses and a short stipulation was all the evidence offered. It is undisputed that the defendant Georgiana Delasaux owed the commissions to some one and that she had paid but \$250 to Whitehead, who claimed to have been the broker in the case. The undisputed evidence is that she owed 3 per cent on the price for which the property sold, which amounts to \$1080. We think we would not be warranted in holding that the finding to the effect that Harsh had sold the property and was entitled to his commission is not warranted by the evidence. Upon a careful consideration of the entire record, we think substantial justice has been done and that the decree ought not to be reversed.

The decree of the Superior court of Cook county is affirmed.

AFFIRMED.

Matchett, P. J., and McMurphy, J., concur.

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249 I.A. 645⁵

WILLIAM H. WILSON,
Appellee,

vs.

HENRY RAEDER,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

MR. PRESIDING JUSTICE O'CONNOR
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action of assumpsit against the defendant to recover damages for the alleged breach of a written contract. The court rejected most of the evidence offered on behalf of the defendant and at the close of the case directed the jury to find the issues for the plaintiff, but the question of damages was left to the jury. The jury fixed the damages at \$20,000, judgment was entered on the verdict and the defendant appeals.

The record discloses that on September 26, 1921, plaintiff, defendant, and Stephen B. Jones entered into a written contract which was prepared by the defendant. It recited, "That in consideration of the aid given to each other and the benefits to be jointly derived" the parties "agree separately and jointly to promote a building for furniture show rooms and exhibition purposes to be located in the city of Chicago." It further provided that Wilson should secure the general endorsement of the enterprise and procure tenants for the proposed building; that Jones should aid financially in promoting the enterprise and that Raeder (who was an architect) should furnish the necessary preliminary drawings for making estimates of costs and in securing tenants; that he should make no charge for his services unless the enterprise was consummated; and further that Raeder should interest contractors in the enterprise. It was agreed that any profits that

543. A. I. 42

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... ..

4-27 persons threatened by violence on 10,000 TRUCKS

Author's address: Department of Psychology, University of California, San Diego, La Jolla, CA 92037, USA.

The court rejected most of the evidence offered on behalf of the defendant.

and before it came out to speak out of the darkness and to the

U.S. DEPARTMENT OF JUSTICE

THE UNIVERSITY OF CHICAGO LIBRARY

[illegible]

The report (1968) on the 1967-68 season is as follows:

willow a total harvest amount of 100,000 lbs. (100,000/100 = 1,000)

Abstracts which are prepared by the following authors:

different and has more than 20 years of experience in the field of international law.

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1996-1997	1997-1998	1998-1999	1999-2000	2000-2001	2001-2002	2002-2003	2003-2004	2004-2005	2005-2006	2006-2007	2007-2008	2008-2009	2009-2010	2010-2011	2011-2012	2012-2013	2013-2014	2014-2015	2015-2016	2016-2017	2017-2018	2018-2019	2019-2020	2020-2021	2021-2022	2022-2023	2023-2024	2024-2025	2025-2026	2026-2027	2027-2028	2028-2029	2029-2030	2030-2031	2031-2032	2032-2033	2033-2034	2034-2035	2035-2036	2036-2037	2037-2038	2038-2039	2039-2040	2040-2041	2041-2042	2042-2043	2043-2044	2044-2045	2045-2046	2046-2047	2047-2048	2048-2049	2049-2050	2050-2051	2051-2052	2052-2053	2053-2054	2054-2055	2055-2056	2056-2057	2057-2058	2058-2059	2059-2060	2060-2061	2061-2062	2062-2063	2063-2064	2064-2065	2065-2066	2066-2067	2067-2068	2068-2069	2069-2070	2070-2071	2071-2072	2072-2073	2073-2074	2074-2075	2075-2076	2076-2077	2077-2078	2078-2079	2079-2080	2080-2081	2081-2082	2082-2083	2083-2084	2084-2085	2085-2086	2086-2087	2087-2088	2088-2089	2089-2090	2090-2091	2091-2092	2092-2093	2093-2094	2094-2095	2095-2096	2096-2097	2097-2098	2098-2099	2099-2100	2100-2101	2101-2102	2102-2103	2103-2104	2104-2105	2105-2106	2106-2107	2107-2108	2108-2109	2109-2110	2110-2111	2111-2112	2112-2113	2113-2114	2114-2115	2115-2116	2116-2117	2117-2118	2118-2119	2119-2120	2120-2121	2121-2122	2122-2123	2123-2124	2124-2125	2125-2126	2126-2127	2127-2128	2128-2129	2129-2130	2130-2131	2131-2132	2132-2133	2133-2134	2134-2135	2135-2136	2136-2137	2137-2138	2138-2139	2139-2140	2140-2141	2141-2142	2142-2143	2143-2144	2144-2145	2145-2146	2146-2147	2147-2148	2148-2149	2149-2150	2150-2151	2151-2152	2152-2153	2153-2154	2154-2155	2155-2156	2156-2157	2157-2158	2158-2159	2159-2160	2160-2161	2161-2162	2162-2163	2163-2164	2164-2165	2165-2166	2166-2167	2167-2168	2168-2169	2169-2170	2170-2171	2171-2172	2172-2173	2173-2174	2174-2175	2175-2176	2176-2177	2177-2178	2178-2179	2179-2180	2180-2181	2181-2182	2182-2183	2183-2184	2184-2185	2185-2186	2186-2187	2187-2188	2188-2189	2189-2190	2190-2191	2191-2192	2192-2193	2193-2194	2194-2195	2195-2196	2196-2197	2197-2198	2198-2199	2199-2200	2200-2201	2201-2202	2202-2203	2203-2204	2204-2205	2205-2206	2206-2207	2207-2208	2208-2209	2209-2210	2210-2211	2211-2212	2212-2213	2213-2214	2214-2215	2215-2216	2216-2217	2217-2218	2218-2219	2219-2220	2220-2221	2221-2222	2222-2223	2223-2224	2224-2225	2225-2226	2226-2227	2227-2228	2228-2229	2229-2230	2230-2231	2231-2232	2232-2233	2233-2234	2234-2235	2235-2236	2236-2237	2237-2238	2238-2239	2239-2240	2240-2241	2241-2242	2242-2243	2243-2244	2244-2245	2245-2246	2246-2247	2247-2248	2248-2249	2249-2250	2250-2251	2251-2252	2252-2253	2253-2254	2254-2255	2255-2256	2256-2257	2257-2258	2258-2259	2259-2260	2260-2261	2261-2262	2262-2263	2263-2264	2264-2265	2265-2266	2266-2267	2267-2268	2268-
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Содержание

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Reuter (who was an excellent) should attend the necessary

Statement regarding the meeting activities of contacts and in connection

the same position and the same as the one in the same position; and

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might accrue would be divided equally among the three. A further provision was that Rader should be the architect for the proposed building and receive a fee equal to five per cent of the cost of the building for his services, 30 per cent of which should be divided equally among the three parties. It further appears from the evidence that plaintiff originated the idea of constructing, in Chicago, a building for the exhibition of furniture; that he had traveled extensively over the country promoting the idea and endeavoring to secure tenants for the proposed building, and that he spent considerable sums of money in such promotional work.

Defendant testified in his own behalf that he met plaintiff shortly before September 26, 1921, the date of the contract above mentioned; that after the execution of that contract he prepared preliminary drawings for the proposed building and had spent about \$15,000 in connection with the enterprise, and that the plans he made were ultimately used ^{when} the building was being constructed.

It further appears that on or about March 16, 1924, the contract which is the basis of the instant case was executed by plaintiff and the defendant (Jones, the third party to the contract of September 26, 1921, having died.) This contract was also prepared by defendant. It recites, "That, whereas, the parties hereto have jointly assisted in the promotion of The American Furniture Mart Building now being erected at 666 Lake Shore Drive, Chicago, Ill., and whereas, the second party (defendant) has entered into contract of same date with Wells Bros. Construction Co. under which Wells Bros. Construction Co. is to deliver to second party six hundred (600) shares of the Preferred Stock of The American Furniture Mart Building*****"

"Now, therefore, in consideration of One Dollar (\$1.00) in hand paid by each party to the other and other good and valuable consideration, the second party hereto agrees to deliver to the

might require would be divided equally among the three. A further provision was that the building should be the architect for the proposed building and receive a fee equal to five per cent of the cost of the building for his services. It further appears from the evidence that plaintiff introduced the idea of constructing, in Chicago, a building for the exhibition of furniture; that he had previously extensively over the country promoting the idea and endeavoring to secure tenants for the proposed building, and that he spent considerable sums of money in such promotional work.

Defendant testified in his own behalf that he met plaintiff shortly before September 26, 1921, the date of the suit. That about that time, that after the expiration of that contract he entered into partnership with plaintiff for the proposed building and that about that time he was connected with the defendant, and that the plan for the building was submitted to the defendant.

It further appears that on or about March 10, 1922, the defendant with a view to the building of the proposed building was connected by plaintiff with the defendant. That the plan for the building was submitted to the defendant on September 26, 1921, before that time. This contract was also prepared by defendant. It further appears, however, that the parties hereto have jointly assisted in the promotion of the proposed furniture building now being erected at 322 Lake Street, Chicago, Ill., and whereas, the second party (defendant) has entered into contract at some date with the first party (plaintiff) with a view to the building of the proposed building at the location of the proposed building.

That, therefore, in consideration of the value of the plan for the building of the proposed building, the second party hereto agrees to deliver to the

first party (plaintiff) hereto 300 shares of the Preferred Stock of the said corporation provided that he receives the said six hundred shares of the said stock from Wells Bros. Construction Company. *****

"The said stock is to be delivered by the second party to the first party when the second party shall have received the amount of stock due the second party from Wells Bros. Construction Company, set forth above.

"It is further understood that a previous agreement entered into by and between the said W. H. Wilson, the said Henry Baeder and Stephen E. Jones of Oak Park, Ill., is hereby declared null and void as far as any obligations between the parties to this agreement are concerned."

This document was signed by plaintiff and defendant.

The evidence further shows that afterwards the Furniture Mart building was constructed and the 600 shares of stock delivered to defendant by the Wells Bros. Construction Co.; that afterwards the defendant refused to deliver to plaintiff the 300 shares of stock, as provided in the contract, the defendant taking the position that plaintiff had obtained a great deal more for his efforts in the promotion and construction of the building than had defendant, and that this was contrary to the understanding of the parties, which was that each should receive equal rewards.

The sole defense interposed was that the contract upon which the suit was based was without consideration and therefore unenforceable; that by the terms of the contract defendant promised to make a gift to the plaintiff of the 300 shares of stock.

In addition to the evidence admitted on behalf of the defendant, he made what his counsel say were thirteen distinct offers of proof, but upon objection of plaintiff the offered evidence was excluded. Defendant's counsel say that the offered

first party (plaintiff) against the owner of the property at
of the said corporation provided that he transfers the said
business assets of the said stock from said stock corporation
company, etc.

The said stock is to be delivered by the second
party to the first party when the second party shall have received
the amount of stock due the second party from said stock corporation
first company, etc.

It is further understood that a written agreement
entered into by and between the said E. W. Wilson, the said Henry
Baker and Stephen E. Jones of New York, N.Y., is hereby declared
null and void in far as any obligations between the parties to this
agreement are concerned.

This document was signed by plaintiff and defendant.
The witness further states that after the transfer
said witness was contacted and the said amount of stock delivered
to defendant by the said stock corporation Co.; that after the
the defendant refused to deliver to plaintiff the said amount of
stock, as provided in the contract, the defendant taking the stock
from said plaintiff had obtained a great deal more for his efforts
in the negotiation and construction of the building than had been
out, and that this was contrary to the understanding of the parties,
which was that each should receive equal rewards.

The said witness further states that the contract was
which the said witness was witness construction and therefore
agreed; that by the terms of the contract defendant promised
to make a gift to the plaintiff of the said amount of stock.
In addition to the evidence given on June 7 at the

defendant, he made that his account was were witness testified
that at that time some agreement of plaintiff and witness
refused to execute. Defendant's account was that the witness

evidence was excluded for the reason that to admit it would be to violate the parol evidence rule, in that the offered evidence tended to vary the terms of the written contract entered into between the parties. The first and second offers of proof made by the defendant were that at no time prior to the execution of the contract in question did plaintiff make a demand of any kind against the defendant; that at no time did plaintiff make any claim against the defendant on account of any services plaintiff had performed in the promotion of the enterprise or for any other matter. These offers were properly excluded. It is obvious that plaintiff had no claim against the defendant for any services he had performed prior to the execution of the contract in suit. Both parties were working on the project in accordance with the terms of that contract, and if the terms of that contract were carried out and the building constructed, the rights of the parties would ripen into an obligation one to the other. But that is not the situation here. By the express terms of the contract upon which this action is based, the first contract was abandoned. The third offer of proof was that under the contract the stock which the defendant was giving to plaintiff was a voluntary gift, and therefore without consideration. This was, of course, a conclusion of law. The fourth offer was that prior to the making of the contract there was no conversation between the parties concerning the 200 shares of stock. This was clearly inadmissible because all prior conversations were merged in the written contract. The fifth offer was to the effect that plaintiff before and after the execution of the contract admitted that he had received 300 shares of the preferred stock and was to receive 1/25th of the common stock, and that the 200 shares in question were no part of plaintiff's compensation for services performed by him. We think it was clearly inadmissible. It was immaterial what other stock plaintiff had received, and the written contract could not be

...was excluded for the reason that it would be to
...the general evidence was, in fact the other evidence
...to the terms of the written contract entered into
...between the parties. The first and second offers of proof
...of the defendant were that at no time prior to the execution of
...the contract in question did plaintiff make a demand of any kind
...against the defendant; that at no time did plaintiff make any
...claim against the defendant on account of any services plaintiff
...had performed in the prosecution of the enterprise or for any other
...matter. These offers were expressly excluded. It is obvious that
...plaintiff had no claim against the defendant for any services he
...had performed prior to the execution of the contract in suit.
...Both parties were working on the project in accordance with the
...terms of that contract, and it was found that plaintiff was
...entitled out and the defendant contracted, the rights of the
...parties would then have been obligated one to the other. But that
...is not the situation here. By the express terms of the contract
...upon which this action is based, the first contract was abandoned.
...The time after that was when the contract was at stake.
...which the defendant was also in plaintiff was a voluntary gift,
...and plaintiff without consideration. This was, of course, a
...violation of law. The fourth offer was that prior to the making of
...the contract there was no conversation between the parties concern-
...ing the two shares of stock. This was clearly inadmissible because
...all prior conversations were merged in the written contract. The
...fifth offer was to the effect that plaintiff believed and after the
...execution of the contract believed that he had received two shares
...of the preferred stock and was to receive 1/2 of the common
...stock, and that the two shares in question were no part of plain-
...tiff's compensation for services performed by him. We know it
...was clearly inadmissible. It was inadmissible that other stock
...plaintiff had received, and the written contract could not be

varied by the offered evidence. The sixth and seventh offers were that the first contract to which Jones was a party was wholly abandoned before the making of the contract in question, and that nothing had been done under the terms of it for a period of about two years before the making of the contract by plaintiff and defendant, and that after Wells Bros. came into the matter in the early part of 1922, none of the work done by plaintiff, the defendant, or the Wells Bros. was in pursuance of the first contract. This was clearly immaterial and contrary to the express provision of the contract in question, in which it was expressly provided that by the making of that contract the first contract was declared null and void. The eighth and ninth offers were that at no time prior to or after the making of the contract in question did plaintiff make any claim against the defendant that plaintiff should be paid by the defendant for his services. Obviously these offers were immaterial. Plaintiff at no time made any such claim and had no such claim, his only claim being that the defendant live up to the written terms of the contract executed by the parties and which was prepared by the defendant himself. The tenth and eleventh offers are substantially to the same effect. The twelfth offer was that in May, 1925, plaintiff and defendant had a conversation in which defendant stated that he would not give plaintiff the 200 shares of stock because since entering into the contract plaintiff was getting more out of the promotion of the building than was defendant. Now this offered evidence was material, we are unable to understand. The thirteenth offer was that in May or June, 1925, the parties had a conversation whereby plaintiff agreed to compromise his claim for 100 shares of the stock. This offered evidence was properly rejected because it was not pleaded, and proposals to compromise and settle a controversy are not competent.

We think all the evidence shows that there was con-

varied by the different evidence. The claim and several others were
that the first contract to which Jones was a party was wholly
unknown before the making of the contract in question, and that
nothing had been done under the terms of it for a period of about
two years before the making of the contract by Plaintiff and de-
fendant, and that after said time, some time later in the
early part of 1932, some of the work done by Plaintiff, the de-
fendant, or the said time, was in pursuance of the first contract.
This was clearly inadmissible and contrary to the express provision
of the contract in question, in which it was expressly provided
that by the making of that contract the first contract was declared
null and void. The elapsed and other others were that at no time
prior to or after the making of the contract in question did plain-
tiff make any claim against the defendant that plaintiff should be
paid by the defendant for his services. Obviously these others
were immaterial. Plaintiff at no time made any such claim and had
no such claim, his only claim being that the defendant owe up to
the written terms of the contract executed by the parties and
which was rejected by the defendant himself. The last and clearest
others are unimportant to the case at all. The fourth other was
that in May, 1932, Plaintiff and defendant had a conversation in
which defendant stated that he would not give Plaintiff the 100
shares of stock because since entering into the contract Plaintiff
was getting more out of the promotion at the building than was the
defendant. Now this other evidence was admitted, we are unable to
understand. The defendant's other was that in May or June, 1932,
the parties had a conversation whereby Plaintiff agreed to con-
vey to him 100 shares of the stock. This other evidence
was properly rejected because it was not admitted, and according to
the claim all the evidence shows that there was con-

consideration for the execution of the contract. Defendant himself testified that prior to the execution of the contract plaintiff and defendant had each rendered a great deal of service in the promotion of the enterprise and the evidence further shows that each had spent considerable money for the same purpose. This was the status of the matter at the time the contract was drawn up by the defendant and executed by both parties; and it is expressly provided in the contract that the rights of the parties under the prior contract were to be relinquished as to each other. This was a good and valuable consideration and in the absence of fraud or mistake the defendant will not be permitted to contradict the written contract so as to render it entirely invalid. Moreover, the contract recites that there was a consideration of one dollar paid, and no offer was made tending to show that this was not a fact. Evidence to contradict this would have been inadmissible if offered. Lawrence v. McGilmont, 43 U. S. 426; Davis v. Wells, 104 U. S. 189; Schneider v. Turner, 130 Ill. 28; Mayer v. Illinois Life Ins. Co., 211 Ill. App. 285. We think all of the evidence shows that there was sufficient consideration; none was offered to the contrary.

The defendant further contends that there was no legal evidence of the value of the shares of stock and therefore the finding of the jury is not based on the evidence. We think this contention is unsound. The only evidence offered on this question was offered on behalf of the plaintiff. The defendant offered none.

A witness for the plaintiff testified that he was assistant manager of Whiting & Company, an investment house which financed the building; that Whiting & Co. were the fiscal agents of the building; that sales of stock of the Furniture Mart Building Corporation had been made in the year 1925, that all transfers of stock were recorded by Whiting & Co., and that the sales were for \$100 a share. There being no evidence to the contrary, this was

The defendant further contends that there was no legal
 consideration; none was offered to the contrary.
 The witness for the plaintiff testified that he was
 assistant manager of Whiting & Company, an investment house which
 financed the building; that Whiting & Co. were the legal owner
 of the building; that sales of stock of the building were made by
 Corporation had been made in the year 1923, that all statements of
 sales were executed by Whiting & Co., and that the sales were for
 1923 - 1924. Whereupon an affidavit as to the contrary, this was
 taken, and the jury is not bound by the statement. We think this
 contention is unavailing. The only evidence offered on this question
 was offered on behalf of the plaintiff. The defendant offered none.
 The finding of the jury is not based on the statement. We think this
 evidence as to the value of the shares of stock and therefore the
 The defendant further contends that there was no legal

sufficient on which the jury might base its verdict. Indeed any other verdict would not have been warranted under the evidence. Evidence of actual sales is the best evidence of the value of an article at the time of the sale. The only absolute test we have of the value of stock is what it has been sold for at a fair sale. All other means of ascertaining the value are speculative and uncertain. A sale is a demonstration of the fact. Edd v. VanOrden, 33 S. J. Eq. 143; Cloyes v. Plautis, 231 Ill. App. 133; Farson v. Bader, 137 Ill. App. 318; City of Chicago v. Lehmann, 263 Ill. App. 468.

There being no evidence received or offered that would warrant any verdict except one for the plaintiff, the judgment of the Superior court of Cook county is affirmed.

AFFIRMED.

Matchett, J., and McSurely, J., concur.

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249 I.A. 646ⁱ

LILLIAN W. SEYMOUR,
Appellee,

vs.

SIGMUND DUNZINSKI,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

MR. JUSTICE McSURNLY DELIVERED THE OPINION OF THE COURT.

Defendant, Dunzinski, seeks the reversal of a decree restraining him from interfering with the complainant in her use of a cement walk between the premises owned by them, respectively. In appellant's abstract and brief the title of the case is erroneously given as Dunzinski v. Seymour.

The matter was referred to a master in chancery. The decree followed the findings and recommendations of the master's report and found that the house erected upon the premises number 3653 North Keller avenue, Chicago, is owned and occupied by the complainant; that the next-door house, number 3655 North Keller avenue, is owned by the defendant; that one Ole Jacobsen owned and built these houses in 1907 and 1910, respectively; that the buildings are used for residence purposes; that Jacobsen constructed upon the division lot line between the two residences a cement walk from the front to the alley in the rear, which walk is built partially on lot number 3653 and partially on lot number 3655 North Keller avenue; that said walk was constructed for the mutual benefit of the two houses and intended to be used in connection with the occupation of the same; that continuously thereafter it was used by the residents and occupants of both buildings as a common passageway between the houses and as a common entrance to the rear portions of the same, as was originally intended it should be when constructed. Subsequently, in 1913, Jacobsen conveyed both buildings to Bridget A. Cowan and during her ownership

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the cement walk was used in common by the residents and occupants of both buildings. March 1, 1926, Sigmund Dunzinski, defendant, and his wife Cecelia acquired title to number 3655, and May 17, 1926, number 3653 was conveyed to Lillian R. Seymour, the complainant. Since defendant acquired title the cement walk has been in the same condition as hereinbefore described and has been used in common by the occupants of both buildings. Shortly after May 23, 1927, defendant erected a wire fence longitudinally on said walk, passing so close to the walls of number 3653 as to make it practically impossible for anyone to use it as a passageway. The decree found that in so doing defendant violated the rights established in favor of the complainant and that the fence constituted an illegal and improper barrier in violation of the rights of the owner of number 3653 North Keller avenue. Defendant was therefore enjoined from obstructing the walk, restrained from interfering with the complainant in her use of the walk and ordered to remove said fence and all barriers which he had constructed thereon and restore the walk to the condition it was in before he began building the fence as described in the bill of complaint.

The only point presented for reversal is that Cecelia Dunzinski, wife of the defendant, a joint owner of the premises, was not made a party defendant. While complainant might properly have made her a party defendant, the bill does not complain of any acts of hers and no injunction is sought against her and the decree does not enjoin her.

Furthermore, the lack of Cecelia Dunzinski as a party defendant was not properly raised upon the hearing. The record shows that an objection filed by the defendant to the master's report reads: "For that the said Master has erroneously over-ruled the motion of the defendant to make Cecelia Dunzinski a party defendant to this suit." The master's report fails to disclose

The report was made in accordance with the provisions of the
of the bill. March 1, 1934, William H. Hays, defendant,
and his wife Cecilia acquired title to number 3885, and say IV,
1934, number 3885 was conveyed to William H. Hays, the con-
plaint. Since defendant acquired title the report was made
in the same condition as heretofore described and has been used
in support of the complaint of said defendant. It is stated
that, 1934, defendant executed a will in which he bequeathed to said
wife, passing no claim to the will of number 3885 as to date of
testamentary disposition for anyone to see it as a testamentary.
The report was made by the defendant and the will was
submitted in favor of the complaint and that the will was
submitted as illegal and improper in violation of the
rights of the estate of number 3885 under said will. Defendant
was not allowed to submit the will, and the will was
submitted with the complaint in her use of the will and ordered
to remove said will and all papers which he had submitted there-
on and restore the will to the condition it was in before he began
submitting the will as described in the bill of complaint.
The only point presented for reversal is that Cecilia
Hays, wife of the defendant, a joint owner of the premises,
has not made a party defendant. While it is true that Cecilia
has not made a party defendant, the bill does not complain of any
note of her and no objection is made against her and the de-
fendant does not object.
Wherefore, the bill of Cecilia Hays as a party
defendant was not properly raised upon the complaint. The report
shows that an objection filed by the defendant to the master's
report was not sustained and was manifestly not sustained.
The master of the bill was not sustained and was
defendant to this bill. The master's report fails to disclose

any such motion, and even if it did the point of want of proper parties cannot be made before a master.

No meritorious reason is presented for reversal, and the decree is affirmed.

AFFIRMED.

Matchett, F. J., and O'Connor, J., concur.

any way better, and even if it did have as much as

any other, it would be better than a worse.

The following is a list of the names of the

persons who have been named in the

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ELKON WORKS, a Corporation,
Appellant,

vs.

F. C. WEST AND COMPANY, a
Corporation Doing Business as
THOMAS SALES COMPANY,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit claiming there was due it from defendant \$1431.14 for merchandise sold. Defendant filed an affidavit of merits and a plea of set-off, alleging that by reason of the faulty character of the merchandise delivered by plaintiff defendant had sustained damages to the amount of \$2786.53. The case was tried by the court, without a jury, which found against the plaintiff on its claim and against the defendant on its set-off. Both parties have appealed to this court where the appeals have been consolidated for hearing. The issues are presented under one abstract and one set of briefs.

Both parties are engaged in the manufacture and sale of devices used in automobiles. Defendant is a distributor of ignition devices. It purchases materials from different factories and has the devices assembled or manufactured by the Thomas-Andrews Corporation at Waukegan, Illinois. The particular devices which are the subject matter of this litigation are Tungsten contact screws and rivets, hereinafter called contact points, which are attached to an apparatus called a breaker plate used in ignition devices for gasoline motors. An electric current passes through the Tungsten faces of these contact points.

Pursuant to an order by samples, plaintiff sold to defendant 50,000 contact points, which were sent to the Thomas-

249 T.A. 646

1917

UNITED STATES DISTRICT COURT

BY ORDER

ALICE SMITH, Plaintiff,
vs.
JOHN SMITH, Defendant.

J. C. SMITH, Attorney at Law,
Chicago, Ill., for Plaintiff.
J. D. SMITH, Attorney at Law,
Chicago, Ill., for Defendant.

IN REPLY TO THE ANSWER OF THE DEFENDANT

The plaintiff complains that the defendant has wrongfully and maliciously
infringed upon her rights in certain valuable and profitable business
concerns of which she is the owner and proprietor, and that she has
suffered great damage and loss of money and profits by reason of

the failure of the defendant to comply with the plaintiff's

demands for compensation for the amount of \$2500.00. The

case was tried by the court, without a jury, which found against

the plaintiff on the claim and against the defendant on the counter-claim.

Both parties have appealed to this court where the appeal has

been consolidated for hearing. The issues are presented under one

pleading and are set of facts.

Both parties are engaged in the manufacture and sale

of devices used in connection with the defendant's business of

the defendant. It is necessary to state that the plaintiff and

the defendant are both engaged in the manufacture and sale of

devices used in connection with the defendant's business of

the defendant. It is necessary to state that the plaintiff and

the defendant are both engaged in the manufacture and sale of

devices used in connection with the defendant's business of

the defendant. It is necessary to state that the plaintiff and

the defendant are both engaged in the manufacture and sale of

devices used in connection with the defendant's business of

the defendant. It is necessary to state that the plaintiff and

Andrews Corporation, where they were attached to ignition devices which were shipped to customers. Shortly thereafter complaints were received from these customers that they were having trouble with the ignition devices, that the motors, where the devices were installed, could not be started or, if started, would run only for a minute or two.

Another concern, the Vansteel Products Company, sells the same type of contact points, and the samples submitted to plaintiff before defendant placed the order were from this company. Defendant had theretofore used the Vansteel points, which had been satisfactory, but plaintiff's prices were less. After the contact points from plaintiff failed to give satisfaction, defendant resumed use of Vansteel points and these gave entire satisfaction.

At the point of contact a metal of unusual heat resisting qualities is required which will not oxidize or otherwise deteriorate. The points purchased from plaintiff were, after use, badly oxidized and pitted so that an electric current would not pass.

Although there is some conflict in the testimony, it was sufficiently shown that defendant, within a reasonable time, called plaintiff's attention to the faulty character of the merchandise, stating that it could not use the product. According to plaintiff's version, it requested defendant to ship the product back and defendant would be given credit. Defendant's witness testified that plaintiff's representative said that it would have to make some adjustment. Later defendant asked permission to return the goods, but plaintiff requested that they be not returned and inquired if they could not be used on another ignition type - the magneto type. This is supported by the correspondence, plaintiff saying in one letter that it was testing the Tungsten points and would have some suggestions to offer which would enable defendant to use the contacts then in its possession. In another letter plain-

tiff says it will advise defendant what steps should be taken so that the contact points would give satisfactory service. Defendant thereupon made the changes suggested and removed the contact points from the breaker plates and installed them on the magneto ignition type, where they seemed to work satisfactorily.

Plaintiff argues earnestly that there was no warranty; that the sale was for a certain standardized article, namely, Tungsten material, and that under such circumstances there can be no warranty, either express or implied. It is in evidence, although there is some evidence to the contrary, that Tungsten is variable in quality and that if it is not good, pure Tungsten of sufficient texture, it will oxidize and burn to pieces and become a non-conductor of electricity; that the points furnished by plaintiff oxidized when heated, and a witness testified that the trouble was caused by the fact that plaintiff's Tungsten "was not up to par." There was an implied warranty that the Tungsten points supplied by plaintiff would be equal in quality and texture to the samples of Vansteel points, which gave satisfaction, and they failed in this respect.

Where a buyer retains and uses the goods sold, it is obligated to pay the contract price less any damages shown to have resulted on account of any breach of warranty. American Theatre Co. v. Siegel, Cooper & Co., 221 Ill. 145; Dorrance v. Dearborn Power Co., 233 Ill. 354, and many other cases.

By reason of the faulty character of the contact points furnished by plaintiff, defendant incurred an item of expense of \$76.50 in replacing 300 screws, rivets and breaker plates, also an item of \$400 for labor in removing contacts in a large number of breaker plates, also repairing 346 ignition devices at an expense of \$397.50. There was also a loss of profit on 313 orders for ignition devices, which were cancelled, amounting to \$491.41. These items total \$1260.47.

The devices were special devices and there is no evidence of any market value for them. Under such circumstances the measure of damages is the loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty. Subsection 6, section 72, Sales, chapter 12 1/2, Cahill's Illinois Statutes.

It is said that the loss was not suffered by the defendant, but by the Thomas-Andrews Corporation. The evidence shows that this latter corporation is a manufacturer for the defendant, which furnishes the raw material to be used in manufacture. The Manufacturing company was merely the agent in this transaction for the defendant, and the damages would be sustained by the defendant as principal and not be the manufacturing agent.

The transfer of the contacts to the magneto systems was at the suggestion of the plaintiff, which should stand the expense of this.

The defendant was entitled to a finding of \$1260.47 upon its plea of set-off which should have been applied in diminution of the amount due plaintiff, \$1431.14, leaving a balance due plaintiff of \$170.67. The judgment of the trial court is reversed, and as the case was tried without a jury we will enter judgment in this court in favor of the plaintiff for \$170.67. The costs of this appeal shall be divided equally between appellant and appellee.

REVERSED AND JUDGMENT IN THIS COURT.

Matchett, P. J., and O'Connor, J., concur.

The device was a special device and there is no
evidence of any device being used. Under such circumstances the
evidence of damage is the fact directly and definitely established.
The primary source of evidence, from the process of recovery,
evidence of damage is, section 7, 1914, Chapter 121, Illinois
Statutes.

It is held that the loss was not suffered by the
defendant, but by the plaintiff. The evidence shows
that this latter corporation is a corporation for the defendant,
which includes the fact that it is used in manufacturing. The
manufacturing company was merely an agent in the transaction for
the defendant, and the damage was suffered by the defendant
as a result of the loss of the manufacturing company.
The transfer of the business to the plaintiff is
not to the suggestion of the plaintiff, which would be the
evidence of this.

The defendant was entitled to a finding of \$1000.00
and the fact of recovery of the same has been applied in Illinois
law of the amount of the plaintiff, \$1000.00, having a balance of
\$1000.00. The finding of the trial court is reversed,
and on the same facts and issues a jury is ordered to find in
this court in favor of the plaintiff for \$1000.00. The costs of this
action shall be paid by the plaintiff. Reversed and remanded.
Reversed and remanded in this court.
Reversed, 2, 1914, Chapter 121, Illinois

32573

249 I.A. 646³

WILSON WORKS, a Corporation,
Appellant,

vs.

F. C. WHITE AND COMPANY, a
Corperation Being Business as
THOMAS SALES COMPANY,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE McSWEENEY DELIVERED THE OPINION OF THE COURT.

The issues and questions involved in this appeal are also involved in case No. 32572, in which opinion has this day been filed. For the reasons stated in that opinion, the judgment of the trial court is reversed. The costs of this appeal shall be divided equally between appellant and appellee.

REVERSED.

Matchett, P. J., and O'Connor, J., concur.

2491.A.648

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PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error.

vs.

LAWRENCE SPLAN,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE McGRADY DELIVERED THE OPINION OF THE COURT.

Defendant was charged with an assault with a deadly weapon - an automobile - and upon trial by the court was sentenced to a term of imprisonment of ninety days in the House of Correction and fined \$200. Defendant seeks a reversal.

Defendant was charged in the information by John J. Curtin with wilfully, maliciously and intentionally running over him with an automobile. The evidence discloses rather unusual circumstances. Curtin on the night of May 2, 1937, was with a friend, a Mr. Howell, on North Clark street, and about midnight or later telephoned for a taxicab. The cab came driven by the defendant, but Curtin and Howell were not yet ready to take it and asked defendant to wait for them, which he did, waiting for half an hour or more. Defendant testified that Curtin and Howell then got into the cab and instructed him to take them to a certain destination, which order was later countermanded and he was directed to take them to Hood avenue; that when they got to Hood avenue Curtin ordered him to drive down the alley, which he refused to do for the reason, as he testified, that he feared a hold-up. An altercation followed. Defendant testified that Curtin called him "hard-boiled" and remarked that such drivers "might get bumped off." There was a dispute over the taxi bill and defendant told his passengers to get back into the cab and he would take them to the police station; that Curtin then said, "God damn you, I have a good mind to bump you off," at the same time making a move to his

349-048

1937

WITNESS TO DEEDS

BY DEEDS

STATE OF ILLINOIS
Defendant in Error

79

ILLINOIS
Defendant in Error

IN, JUDGE ROBERT J. BELLING THE OFFICE OF THE CLERK

Defendant was charged with an assault with a deadly weapon - an automobile - and upon trial by the court was sentenced to a term of imprisonment of ninety days in the House of Correction. Defendant, being a party.

Defendant was charged in the indictment by John J. Gurin with unlawfully, maliciously and intentionally running over him with an automobile. The evidence disclosed rather strongly that Gurin on the night of May 2, 1937, was with a friend, a Mr. Howell, on North State Street, and about midnight or later returned for a car. The car was driven by the defendant, but Gurin and Howell were not yet ready to take it and asked defendant to wait for them, which he did, waiting for half an hour or more. Defendant testified that Gurin and Howell then got into the car and instructed him to take them to a certain location, which order was later countermanded and he was directed to take them to Reed Avenue; that when they got to Reed Avenue Gurin ordered him to drive down the alley, which he refused to do for the reason, as he testified, that he feared a hold-up. An altercation followed. Defendant testified that Gurin called him "hard-boiled" and remarked that such persons "might get bumped off." There was a struggle over the taxi bill and defendant said his passengers to get back into the car and he would take them to the police station; that Gurin then said, "Don't turn me, I have a good mind to bump you off," at the same time making a move to hit

back pocket; defendant says he thereupon became upset and excited and started his machine into the alley, going over an embankment and on through the prairie, damaging the cab; that he was afraid Curtin was going to kill him; that if he struck the man, he did not do so intentionally. Defendant at once got in touch with the road superintendent of the taxicab company and they looked for a policeman. The superintendent and the defendant rode back to the scene of the altercation and from there to the police station at about 3:40 a. m., where defendant reported that there had been an attempted hold-up. The police officer, the road superintendent and the defendant, after some extensive search, found Curtin at St. Joseph's hospital at about eight o'clock a. m.

Curtin denies that he told the defendant to drive down the alley and denies that he made a movement to his back pocket during the altercation. Curtin and Howell gave testimony tending to show that defendant intentionally drove up on the sidewalk and struck them with his cab, inflicting serious injuries, because they would not pay what they considered an exorbitant taxicab bill.

The court held that testimony as to whether Curtin and Howell were intoxicated was not admissible. Such testimony should have been heard not only as touching the recollection of the complaining witnesses as to the occurrence but also as tending to support the theory of the defense that they used the alleged threatening language because of their condition at the time.

We are not satisfied to allow this judgment to stand. The charge against the defendant is a serious one and, so far as the record shows, the complaining witnesses are reputable citizens. The case was tried in a more or less haphazard way. Evidence as to all the facts and circumstances should be heard. If the alley in question was near Howell's residence, this should definitely appear

back road; defendant says he then upon hearing noise and seeing
and started his machine into the alley, going over an embankment
and on through the bushes, emerging the way; that he was afraid
Gartin was going to kill him; that if he returned the way, he did
not do so intentionally. Defendant at once got in touch with the
first representative of the federal company and they looked for a
tailman. The representative and the defendant went back to the
scene of the abduction and from there to the police station at
about 8:40 a. m., where defendant reported that there had been an
attempted kidnapping. The police officer, the road representative
and the defendant, after some extensive search, found Martin in
St. Joseph's Hospital at about eight o'clock a. m.
Martin said that he felt his abdomen was being
torn the alley and stated that he made a movement to his back
which caused the abduction. Martin was severely injured
leading to show that defendant intentionally drove up on the side
walk and struck them with his car, inflicting serious injuries,
because they would not say what they considered an excellent
testimony.
The court held that testimony as to whether Martin
and Gartin were intoxicated was not admissible. Such testimony
should have been heard not only as bearing the question of
the culpability of defendant as to the abduction but also as bearing
on the theory of the defense that they used the alleged
intoxicating language because of their condition at the time.
We are not satisfied to allow this testimony to stand.
The charge against the defendant is a serious one and, as far as
the record shows, the examining witnesses are reputable citizens.
The case was tried in a more or less haphazard way. Defendant as to
all the facts and circumstances sought to show. It was alleged in
testimony that Gartin's testimony was untrue and that Gartin was

by evidence. The testimony as to the amount of the taxicab bill is vague. There is no evidence as to how Curtin and Howell left the scene of the alleged assault. Apparently some of Curtin's clothes were subsequently found at the place, but this is unexplained. There is no evidence as to when Curtin went to the hospital or as to his condition when he arrived there, nor as to Howell's condition after the alleged assault, except their own statements. All the facts and circumstances of the occurrence should be shown so that the trial court may have a sound basis for a conclusion.

There is a suggestion in the record that the facts had passed from the recollection of the trial Judge at the time he made his finding and pronounced sentence. A new trial should develop all the facts and circumstances, and the judgment is therefore reversed and the cause remanded.

REVERSED AND REMANDED.

Matchett, P. J., and O'Connor, J., concur.

by witness. The testimony as to the amount of the ransom still
is vague. There is no evidence as to how Griffin and Howell left
the scene of the alleged assault. Apparently some of Griffin's
clothes were subsequently found at the place, but this is un-
explained. There is no evidence as to when Griffin went to the
hospital or as to his condition when he arrived there, nor as to
Griffin's condition after the alleged assault, except that the
statements. All the facts and circumstances of the occurrence
should be shown so that the trial court may have a sound basis
for a conclusion.

There is a suggestion in the record that the facts
not stated from the recollection of the trial judge at the time
he made his finding and pronounced sentence. A new trial should
be granted all the facts and circumstances, and the judgment is
therefore reversed and the cause remanded.

REVEREND AND HONORABLE,

Respectfully, J. J. and O'Donnell, J. J. counsel.

CHARLES A. MANTHIE,
Appellee,

vs.

ALBERT SHEPANEK,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff, bringing suit to recover real estate broker's commission, upon trial by the court had judgment for \$750, from which defendant appeals.

As the case must be re-tried we shall not state the evidence at any length. The transaction on which plaintiff claims a commission was a sale by defendant of certain property to the Standard Oil Company. Plaintiff did not procure the purchaser. Some considerable time before the defendant acquired the property in question, plaintiff had introduced a broker named Roe to him. Roe was the broker for defendant in the sale to the Standard Oil Company.

Plaintiff's claim rests upon a street conversation with defendant over a year after the sale, in which he says defendant promised to pay him \$750 as commission. The court seems to have based its finding solely upon this conversation. Defendant denied that this conversation took place and denied that he at any time promised to pay plaintiff anything for commissions. Defendant offered to show that the Logan Square Bond & Realty Company, acting through Roe, its employee, was the procuring cause of the sale; that this company was paid the commission provided for in the contracted sale. The court held that all such evidence was inadmissible on the theory that, regardless of who procured the buyer and received a commission therefor, defendant was bound by ^{his} alleged

249 LA 448

1918

ATTEST: JOHN EDWIN WHITE, CLERK
OF CHICAGO.

WILLIAM A. HARTLEY,
vs.
ALBERT W. HARTLEY,
defendant.

THE COURT, after reading the petition of the plaintiff,

finds that the plaintiff, William A. Hartley, is entitled to recover the sum of \$100.00, plus costs, from the defendant, Albert W. Hartley.

As the case was brought on by the plaintiff, it is his duty to prove his case. He has done so by the evidence introduced. The defendant has failed to rebut the evidence. The court is satisfied that the plaintiff is entitled to the sum of \$100.00, plus costs. The defendant is ordered to pay the sum of \$100.00, plus costs, to the plaintiff. The court is satisfied that the plaintiff is entitled to the sum of \$100.00, plus costs. The defendant is ordered to pay the sum of \$100.00, plus costs, to the plaintiff.

WILLIAM A. HARTLEY, plaintiff, vs. ALBERT W. HARTLEY, defendant. The court is satisfied that the plaintiff is entitled to the sum of \$100.00, plus costs. The defendant is ordered to pay the sum of \$100.00, plus costs, to the plaintiff. The court is satisfied that the plaintiff is entitled to the sum of \$100.00, plus costs. The defendant is ordered to pay the sum of \$100.00, plus costs, to the plaintiff.

promise to plaintiff. The evidence was admissible as tending to negative the testimony of plaintiff as to the promise of defendant, for it would hardly be probable that, where one broker had exclusively negotiated a sale and received a commission, the seller would subsequently - especially a long time thereafter - promise to pay another broker a similar commission. Furthermore, the evidence tended to show that, if the promise was made, it was a mere nudum pactum.

The case was tried in an informal, irregular manner. All facts relating to the transaction should have been considered. We would also suggest that if this case is tried again the broker Roe should testify, giving his version of the matter.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Matchett, P. J., and O'Connor, J., concur.

promise to testify. The witness was advised as follows: "You are not to testify in this case."

For it would hardly be possible that, after the witness had been advised as follows: "You are not to testify in this case," the witness would testify in this case. The witness was advised as follows: "You are not to testify in this case."

THE WITNESS WAS ADVISED AS FOLLOWS:

The case was tried in an informal, friendly manner. All facts relating to the transaction should have been considered. The witness was advised that in this case he was to testify in the case. The witness was advised as follows: "You are not to testify in this case."

The witness was advised as follows: "You are not to testify in this case."

THE WITNESS WAS ADVISED AS FOLLOWS:

THE WITNESS WAS ADVISED AS FOLLOWS:

CENTRAL REFINANCE CORPORATION,
a Corporation,

Appellant,

vs.

JOHN SIPICH, also known as
John Cipic,

Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE McDERMOT DELIVERED THE OPINION OF THE COURT.

Plaintiff had a judgment entered against defendant for \$450 by confession upon a judgment note. On motion the judgment was opened and defendant was given leave to appear and defend. There was a jury trial and a verdict and judgment on the verdict, but the abstract gives no information as to either. From the fact that plaintiff appeals, we assume that the verdict and judgment were against him.

The first point presented is that plaintiff must prove his case by a preponderance of the evidence. Doubtless this is true. Defendant's son Andrew testified that plaintiff agreed to sell him an automobile, allowing him \$100 on his old automobile, and his father, the defendant, was to sign a note for \$400; that the note was not filled out; that his father could not read but signed the note and plaintiff took it away; that neither he nor his father received the automobile which they had thus purchased and have never received anything whatsoever for the note, and that up to the time of the trial no automobile had been delivered to them in consideration for the note; that he did not know where the men with whom he dealt were from.

An employee of the plaintiff testified that he never had any dealings with either the defendant or his son; that he first met them upon the trial; that plaintiff got the note from the South Chicago Paige Jewett Company, but the witness did not

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Source: *Journal of the American Statistical Association*, 1990, 85, 103-113.

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From 12 years.

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THE UNIVERSITY OF CHICAGO

1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 2679, 26

THESE ARE THE RESULTS OF THE RESEARCH CONDUCTED BY THE RESEARCHER.

STANLEY had a judgment against himself introduced
for him by another man a judgment made. He called the fair-
ness was agreed and defendant was given leave to appear and defend.
There was a jury trial and a verdict was returned on the verdict.
and the district gives no information as to either. From the fact
that Stanley cannot, we know that the verdict was returned

[illegible]

the first thing I saw when I stepped out of the car was a man in a suit and tie, looking at me with a serious expression. He was standing in the middle of the street, and I was not sure if I should stop or not. I decided to stop and ask him what was going on. He told me that he was a police officer and that he had seen a car like mine in the area. He asked me if I was the driver of the car and I told him yes. He then asked me if I had any passengers and I told him no. He then asked me if I had any identification and I told him yes. He then asked me to get out of the car and he searched me. He found nothing on me and he let me go. I was a bit confused by the whole thing, but I didn't want to cause any trouble, so I just drove away.

know of his own personal knowledge where the plaintiff's representative got the note and does not know whether or not plaintiff's representative had the defendant sign the note.

Neither the note nor the chattel mortgage, which is said to have been given, is in the abstract. We must therefore assume that both note and chattel mortgage ran to plaintiff. Where testimony is inadequately abstracted, the presumption is that the evidence if completely abstracted would sustain the judgment. Gies v. Shedd, 218 Ill. 309. The evidence established without controversy that defendant gave the note as part of the purchase price of an automobile which he never received. Therefore there was a failure of consideration.

Even if we assume that plaintiff purchased the paper, notes secured by chattel mortgages when assigned are subject to all defenses existing between the payee and the payer of said notes, the same as if said notes were held by the payee therein named. Chapter 25, Mortgages, paragraph 27, Cahill's Illinois Statutes.

The son testified that the defendant at the time of the trial was in the insane asylum, and plaintiff argues that an insane person must be represented in court by a conservator duly appointed. The evidence fails to show that defendant was adjudged insane; for aught appears, defendant was employed in the asylum. Furthermore, plaintiff proceeded with the trial without objecting; it cannot now raise this point.

Upon the record as presented to us, the only proper verdict was to find the issues against the plaintiff. The judgment is affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.

[illegible]

CITY OF CHICAGO,
Appellee,

vs.

O. L. HAGLEY,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

The City of Chicago by a complaint charged the defendant with operating and keeping an ice cream parlor in the City of Chicago without first having obtained a license to do so, in violation of Section 3431 of the Chicago Municipal Code. Upon trial by the court the defendant was found guilty and fined \$25. She appealed directly to the Supreme court, which held that it did not have jurisdiction and transferred the cause to this court. City of Chicago v. Hagley, 329 Ill. 635.

The section of the Municipal Code referred to provides that no person shall engage in the business of keeping what is generally known as an ice cream parlor without first having obtained a license. The Supreme court opinion states the facts and issues substantially as follows: Defendant is operating a place of business at 127 East 55th street, Chicago, where she serves meals, sandwiches, candies, ice cream, soda waters and other articles of food and drink usually kept in a first-class restaurant. She contends that she is operating a tearoom and that her sales of ice cream are merely incidental to her business of serving meals and lunches. Defendant says that the evidence shows that she is not operating an ice cream parlor, and the City says it shows that she is. If the Municipal court has correctly decided that she is conducting an ice cream parlor, its judgment is right; but if she is conducting a restaurant and her sales of

CHIEF OF POLICE
CITY OF CHICAGO

CITY OF CHICAGO
OFFICE OF THE
CLERK OF THE
CITY OF CHICAGO

RE: JUDITH MCKENNEY MILLER, THE CHIEF OF POLICE.

The City of Chicago by a complaint charged the defendant with operating and keeping an ice cream parlor in the City of Chicago without first having obtained a license to do so, in violation of section 1411 of the Chicago Municipal Code. Upon trial by the court the defendant was found guilty and fined \$100. The court directed to the Sheriff to hold that it is and have jurisdiction and transferred the case to this court. City of Chicago v. Miller, 111 Ill. 433.

The section of the Municipal Code referred to above reads that no person shall engage in the business of keeping what is usually known as an ice cream parlor without first having obtained a license. The Municipal Code defines the term "ice cream parlor" as follows: "Parlor" is defined as a place of business at 127 West 33rd Street, Chicago, where ice cream, soft drinks, sandwiches, pastries, and other refreshments are served and where refreshments are served in a first-class restaurant. The court said that one is operating a business and that her sales of ice cream are merely incidental to her business of serving meals and refreshments. The court said that the defendant is not operating an ice cream parlor, and the City says it shows that she is. If the Municipal Code has correctly been cited that she is conducting an ice cream parlor, the judgment is right; but if she is conducting a restaurant and her sales of

ice cream are only incidental to the restaurant business, the judgment is wrong.

There is thus presented to this court only the question whether she is conducting an ice cream parlor or a restaurant. We hold that the evidence shows that she is conducting a restaurant business and that the sales of ice cream and beverages are incidental thereto.

The evidence shows that between sixty and seventy per cent of the business was the serving of hot food and the remainder was about equally divided between sales of candy and ice cream, including ice cream served at meals. Eighty per cent of the space in the store was devoted to restaurant purposes. Seventy-five per cent of the pay-roll was used to pay employees engaged in serving hot food and meals. Ice cream was served with meals and occasionally separate from meals. Two of defendant's menus are in evidence showing an extensive variety of food, made up of many items. Only a few of these relate to ice cream or beverages. Under any reasonable definition, the business conducted was a restaurant and not an ice cream parlor.

Decided cases influencing our conclusion are Barnard & Miller v. City of Chicago, 316 Ill. 519, in which it was held that statutes granting powers to municipal corporations are to be construed strictly and any reasonable doubt as to the existence of the power must be resolved against the municipality. See also Emmons v. City of Lewiston, 132 Ill. 380; Village of Cerro Gordo v. Rawlings, 135 Ill. 36.

The evidence does not warrant the judgment entered and it is reversed.

REVERSED.

Matchett, P. J., and O'Connor, J., concur.

FOREMAN TRUST & SAVINGS BANK,
Administrator of the Estate of
Kazimir Proscievich, Deceased,
Appellee,

vs.

GRAND TRUNK WESTERN RAILWAY COMPANY,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an action by the administrator of a deceased employee under the Federal Employers' Liability act, whereby the plaintiff seeks to recover damages against the defendant on account of injuries resulting in death sustained by the deceased while working for the defendant at one of its yards in the city of Chicago near 12th street on April 24, 1924. There was a trial by jury and a verdict for plaintiff in the sum of \$22,500, upon which the court, over-ruling motions for a new trial and in arrest, entered judgment. The same cause was before us on a former appeal. Foreman T. & S. Bank v. G. T. W. Ry. Co., 242 Ill. App. 438.

A judgment for the administrator in the sum of \$18,000 was there reversed for the reason, as this court found, that the evidence failed to show that the deceased at the time of the injuries which resulted in his death was employed in interstate commerce.

The facts stated in the opinion filed in that case need not be repeated here. An examination of the record discloses no material difference. Upon the former trial most of these facts were presented by stipulation; upon the present trial, by the testimony of witnesses. As the facts are in substance the same, it will not be necessary to repeat the recital of facts as given in the former opinion: We there said:

"From this review of the decisions, we are persuaded the evidence in this case fails to make prima facie proof of a case

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WITNESSES TO THE DEEDS OF THE DEFENDANT

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for plaintiff under the statute. When the interstate shipment of meat was unloaded at Twelfth street, so far as the evidence here discloses, the interstate movement of the car ceased. Other movements, first to the track and later to the yards for repair, were presumptively intrastate movements, and there is no evidence from which a jury could reasonably find that such movements were other than intrastate movements. In fact there is not a scintilla of evidence in the record showing that the movements of the car, first to the track and afterwards to the yards, were in connection with any interstate purpose. The plaintiff cannot establish her case by a guess. It may or may not have been that the movement of the car to the track and afterwards to the yards for repair was only the interruption of a general interstate movement; but if such is the case, this record is wholly devoid of any testimony tending to show that material fact."

This court is bound by its former decision, and we apprehend it to be our duty to reverse this judgment without remanding the cause and for reasons there fully stated.

The judgment will therefore be reversed with finding of fact and judgment here for defendant.

REVERSED WITH FINDING OF FACT
AND JUDGMENT HERE.

O'Connor, P. J., and McSurely, J., concur.

FINDING OF FACT.

We find as a fact that at the time deceased received the injuries which resulted in his death and on account of which the administrator brings suit, neither defendant nor said deceased was engaged in interstate commerce within the meaning of the Federal Employers' Liability act.

CHARLES DICKINSON BOYLES,
Appellant,

vs.

CHARLES S. QUINLAN, Executor of
the Estate of Albert Dickinson,
Deceased, EMMA BENHAM DICKINSON,
ILLINOIS MERCHANTS TRUST COMPANY,
an Illinois Corporation, etc., et al.,
Appellees.

APPEAL FROM SUPERIOR
COURT OF COOK COUNTY.

MR. ~~XXXXXXXX~~ JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

This appeal is by Boyles, one of the legatees, from a decree construing the will of Albert Dickinson. The deceased in his lifetime was interested in the seed business. Boyles, a nephew, began working for him in 1887 as an office boy. He continued to work with his uncle until 1888, when the Albert Dickinson Company was organized to continue the same business, and Boyles became the secretary of the company.

Charles Dickinson, a brother of the testator, was a stockholder, and in 1912 obtained control of the company through securing the vote of certain stock which up to that time was owned and controlled by another brother of the testator, Nathan Dickinson, now also deceased. When Charles Dickinson obtained control of the company, Albert practically retired therefrom and for eight years thereafter took no part in its affairs. The nephew Boyles, however, remained on the Board of Directors and kept Albert Dickinson informed about the business.

On May 10, 1920, Boyles and Albert Dickinson again acquired control of the corporation as the result of an agreement with Charles Dickinson, by which they guaranteed to him certain dividends on his stock in the company. To secure this guaranty shares of stock of different companies which had been organized

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CHAS. H. HARRIS, President
CHAS. H. HARRIS, Secretary

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THE HARRIS TRADING COMPANY
HARRIS TRADING COMPANY

This report is by Robert, one of the partners, from a partner concerning the will of Albert Harrington. The partner in his lifetime was interested in the same business, and began working for him in 1887 as an office boy. He was elected to work with him until 1888, when the Albert Harrington was organized to continue the same business, and began to work for the company.

Charles Harrington, a partner of the partner, was a shareholder, and in 1891 obtained control of the company through securing the vote of certain stock which he at that time was owner and controlled by Charles Harrington of the partner, Robert Harrington, now also deceased. When Charles Harrington obtained control of the company, Albert Harrington retired from the company, and his partner took over the office. The partner later, however, remained on the board of directors and kept Albert Harrington informed about the business.

On May 12, 1890, Robert and Albert Harrington again requested control of the corporation as the result of an agreement with Charles Harrington, by which they guaranteed to the partner dividends on his stock in the company. He secured this guarantee of stock of Albert Harrington and has been organized

in connection with the business were placed in the name of Henry Babson as trustee. Boyles and Albert Dickinson further agreed that the Chicago Dock Company (another corporation which they controlled) would lend to the Albert Dickinson Company \$1,000,000. The loan was needed. The statement of the company as of June 30, 1920, showed losses for the previous twelve months amounting to \$471,366.30.

As a result of this agreement Charles Dickinson retired from the business, Boyles was elected president of the corporation and has held the office since that time. Boyles was then 34 years of age and Albert Dickinson 78.

During the five fiscal years prior to June 29, 1920, the combined net earnings of the ailed Dickinson companies amounted to \$1,494,136.62. From June 29, 1920, to October 27, 1923, these same companies showed a total loss of \$1,011,324.10.

The will of Albert Dickinson, which is construed by the decree, was executed on June 29, 1920. It gave certain specific properties to the testator's wife and to her also further a legacy of \$200,000. It named the nephew Charles D. Boyles executor, and bequeathed to him an undivided one-third interest in a parcel of real estate. Article 4, which the decree construed, is as follows:

"I also give and bequeath unto my said nephew Charles Dickinson Boyles and The Merchants' Loan and Trust Company, as Trustees, and to the survivor of them, for the benefit of my said nephew, all the shares of capital stock which I may own, at the date of my decease, of the following corporations:

The Albert Dickinson Company, a corporation of Illinois;
Mungesser-Dickinson Seed Company, a corporation of New Jersey;

Twin City Trading Company, a corporation of Minnesota;

Edward Jones Company, a corporation of Minnesota;

Craver-Dickinson Seed Company, a corporation of New York;

The Albert Dickinson Company of Massachusetts, a corporation of Massachusetts;

or the shares of stock in any corporation or corporations for which I may have exchanged said stocks during my lifetime; said shares shall include any shares belonging to me and standing in the name of Henry Babson, Trustee, or his successor in trust, and this bequest is upon condition that my said nephew shall assume any obligations for the security of which said shares may have been deposited with the said Babson as Trustee, and shall hold

the remainder of my estate harmless from any claim, demand, expense, loss or damage on account of said obligations, to have and to hold upon the following trusts and for the following purposes, that is to say:

(1) To pay the entire net income from said trust estate to my said nephew, Charles Dickinson Boyles, during the term of his natural life." ***

The Article further provided that upon the death of Boyles the trustee should convey the fund to the legatees and devisees of the residuary estate; provided that if all the legacies and bequests should not have been paid in full, the trust estate should be first applied to the payment of these legacies. Another section granted power to hold and manage the trust estate and provided:

"If said shares of stock constituting this trust estate shall be, before or after my death, sold, exchanged, or otherwise disposed of, the proceeds of such sale, exchange or other disposition shall pass to or be retained by said Trustees upon the same trust as hereinabove provided."

The will gave specific legacies to certain of the testator's nephews, nieces and cousins, to his sister Frances, to the son of his nephew, Thomas D. Boyles, and after the payment of these, provided for legacies to a number of charitable organizations, including the Y.M.C.A. and the Old People's Home of the City of Chicago, which ^{two} are designated residuary legatees.

At the time of the execution of this will the testator owned 3,161 shares of the capital stock of the Chicago Dock Company, the corporation already mentioned, and on August 3rd thereafter the Dock company loaned to the Albert Dickinson Company, as had been agreed, \$1,000,000. On September 16th thereafter the certificate of incorporation of the Albert Dickinson Company was amended and its capital stock changed to shares of common stock of no par value and shares of preferred stock of no par value. In December, 1922, 9490 shares of this preferred stock were delivered by the Albert Dickinson Company to the Dock Company in satisfaction of the indebtedness to it which at that time had been reduced to \$949,000. This was the only preferred stock of the Albert Dickinson Company ever issued. The

The provision of my estate hereunder from my estate, income, expenses, loss or damage on account of said estate, in any way or form, shall be paid to the following parties and for the following purposes, that is to say:

(1) To pay the estate and income from said estate to my said widow, Gertrude Elizabeth Taylor, during the term of her natural life.

The widow Taylor provided that upon the death of

By the said estate should convey the land to the husband and business of the testator estate, provided that in all the husband and business should not have been sold in 1911, the same estate should be first devoted to the payment of these legacies. Another provision granted power to hold and manage the trust estate and provided:

"It shall be the duty of the trustee hereunder to invest the same in such manner as he may deem best, and to pay the income, principal, or either thereof, at the discretion of the trustee, to the persons named herein, and to the same trust shall pass to or be retained by said trustees upon the same trust as hereinabove provided."

The will gave generally to the legacies the proceeds of the executor's nephew, Nelson and nephew, to his sister Thomas, to the son of his nephew, Thomas E. Taylor, and after the payment of these, provided for legacies to a number of charitable organizations, including the Y.M.C.A. and the Old People's Home of the City of Chicago, and the following legacies:

At the time of the execution of this will the testator owned 3,121 shares of the capital stock of the Chicago Bank Company, the corporation already mentioned, and as against the executor the corporation issued to the Chicago Bank Company, as has been stated, \$1,000,000. On September 18th, 1907, the executor was notified of the information of the Albert Edmonson Company was made and the capital stock changed to shares of common stock of no par value and shares of preferred stock of no par value. In December, 1907, 1908, 1909, and 1910, the executor was notified of the information of the Albert Edmonson Company as has been stated in relation to the information of the information as to the fact that the stock had been reduced to \$250,000. This was the only preferred stock of the Albert Edmonson Company ever known. The

assets of the Dock Company were distributed to the stockholders thereafter on July 31, 1923, and at that time there were transferred to Albert Dickinson, with other securities, 7042 shares of this preferred stock. These shares were delivered by the Dock Company to William F. Hale, who at that time had become the attorney of Albert Dickinson. The certificates of stock representing these shares were endorsed in blank by Albert Dickinson, and he continued to own them until the time of his death.

Boyles, a stockholder and vice-president of the Chicago Dock Company, participated in these transactions, was present and voted for all the necessary resolutions. Albert Dickinson, who then held about 75% of the outstanding stock of the Dock Company, also participated in these proceedings and continued to be a director of the Chicago Dock Company until July 10, 1923, when his place was taken by his attorney, Hale. Albert Dickinson did not personally attend any of the meetings of the stockholders or board of directors of either the Dock Company or Albert Dickinson Company after the year 1920, but he was represented by proxy and his representatives had full information in regard to the affairs of these companies during the years 1921, 1922 and 1923. The preferred stock of the Albert Dickinson Company has not paid any dividends since it was issued.

On August 14, 1922, a corporation was organized under the laws of the State of Delaware, taking the name of Dickinson Company, with a total authorized issue of 65,000 shares of stock. On or about January 19, 1923, Albert Dickinson exchanged all the shares of common stock which he owned in the various companies in which he was then interested, except his shares of stock in the Chicago Dock Company, for 10646 shares of stock of this Dickinson Company, the Delaware corporation. At that time Albert Dickinson did not own any preferred stock of the Albert Dickinson Company. The Delaware Company

assets of the Bank Company were distributed to the shareholders
as follows: on July 11, 1901, and at that time there were 100,000
shares of stock, and the assets were distributed to the shareholders
as follows: These shares were delivered by the Bank Company to
William R. Ely, who at that time had become the attorney of Albert
Dickinson. The certificate of stock representing these shares were
delivered to him by Albert Dickinson, and he continued to own them
until the time of his death.

On July 11, 1901, a dividend was also paid to the shareholders
of the Bank Company, amounting to \$100,000, and the same
was paid for all the outstanding shares of the Bank Company.
This would show that the outstanding shares of the Bank Company
also participated in these proceedings and continued to be a dividend
of the Chicago Bank Company until July 11, 1901, when the shares were
taken by the attorney, Ely. Albert Dickinson did not participate
in any of the meetings of the shareholders or board of directors
of either the Bank Company or Albert Dickinson Company after the year
1901, but he was represented by proxy and his representatives had full
information as to the affairs of both companies during the
years 1901, 1902 and 1903. The following table is the Albert Dickinson
and Company has not paid any dividends since it was formed.

On August 14, 1902, a corporation was organized under
the laws of the State of Delaware, under the name of Dickinson Com-
pany, with a total authorized issue of 50,000 shares of stock. On or
about January 10, 1903, Albert Dickinson exchanged all the shares of
common stock which he owned in the various companies in which he was
then interested, except his shares of stock in the Chicago Bank Com-
pany, for 10,000 shares of stock of this Dickinson Company, the
shares represented. At that time Albert Dickinson did not own any
shares of stock of the Albert Dickinson Company. The following company

was organized pursuant to a plan formed prior to the execution of the will and was intended to be used as a holding company which would acquire the stock of the Albert Dickinson Company of Illinois and its allied corporations.

After the execution of the will there was no substantial change in the assets owned by the decedent with the exception that one piece of real estate which had been specifically devised by the will was conveyed to Boyd Dickinson.

On October 27, 1923, the testator executed a codicil to his will in which he gave a further specific bequest of \$10,000 to a relative, and stated:

"In view of the fact that there may be no ready market for the sale of some of the assets of my estate I direct that my property after the dispositions made in made in Articles I, II and III of my Will shall be paid to my Trustees and that they shall set up the trusts and pay all the legacies without interest which are mentioned in my Will and in this Codicil, and my said Trustees may delay the payment of such legacies in order to fully realize upon my estate or for any other reason in their discretion; but said legacies shall be paid as rapidly as possible in the order in which they are named and all of them shall be paid within ten (10) years after my death."

This codicil names Charles S. Quinlan as executor instead of Charles D. Boyles. The codicil did not expressly republish the original will. It was prepared for the testator by his then attorney, Hale, who personally represented the deceased after October, 1921, and who prior to that time had represented him as executor of the estate of his sister.

Mr. Hale testified that just prior to the making of the codicil Mr. Albert Dickinson was very hard of hearing and that it was very difficult to communicate with him. His evidence also tends to show that Boyles had caused the Albert Dickinson Company to enter into some kind of an arrangement for consolidating with another company known as the Continental Seed Company, of which a Mr. Heath was "the guiding spirit;" that Albert Dickinson was not entirely satisfied with the way Mr. Boyles handled this matter; that what Albert

was organized pursuant to a plan devised by the defendant and was intended to be used as a holding company which would acquire the stock of the Albert Heineken company of Illinois and the

After the execution of the will there was no subsequent change in the estate owned by the decedent with the exception that one piece of real estate which had been specifically devised by the will was sold to David Nicholson.

On October 27, 1965, the reporter executed a contract
to his wife as well as have a further specific payment of \$10,000 for a

"In view of the fact that there may be no ready market for the sale of any of the assets of my estate I request that my property be sold at public auction in order to realize the full value of my estate and that the proceeds be paid to my estate or to the executor of my estate."

the cause of his sister.

[illegible]

Dickinson really desired was to get the services of Mr. Heath without any consolidation. Mr. Hale, however, says that Albert Dickinson at no time made any statement in which he directly blamed Boyles for the losses of the Albert Dickinson Company, and he explains the fact that an additional trustee under the will was added by saying this ^{was} upon suggestion by himself in order to comply with the laws of the State of Florida where Albert Dickinson and his family then resided.

the fact
Mr. Hale's evidence further shows ^{the fact} that there probably would not be available assets for the payment of all the legacies provided for in the original will was made known to the testator prior to the execution of the codicil; that having that matter in mind Mr. Hale prepared a draft of a new will and went through the different provisions of it with Albert Dickinson and Mrs. Dickinson; that Albert Dickinson himself took the new will and spent a long time looking it over and when he got through reading it he shook his head and said, "I don't understand;" that Mr. Hale then inquired particularly of the testator as to what it was he did not understand and the testator said that he understood the fact that he might not have enough money to pay all the legacies but that he could not remember distinctly the different charities and what they were. He said, "he recalled a few of them, but when he attempted to tell me what they were, he became uncertain and said, 'I don't remember.'" Mr. Hale then asked him whether he would like to abandon the draft of the will and prepare a codicil and he said he would and this was done and the codicil executed.

On January 3, 1925, a trust estate amounting in value to about \$35,000 was created by Albert Dickinson for the benefit of certain of his relatives. He died on April 5, 1925, being at that time more than 83 years of age, and left him surviving as his only heirs at law and next of kin, Emma Benham Dickinson, his

widow; Charles Dickinson, his brother; Frances Dickinson, his sister; Charles Dickinson Boyles and Albert Boyd Dickinson, his nephews; Katherine Boyles and Ruth Dickinson, his nieces, and Thomas D. Boyles, his grandnephew.

The decree finds that the will is ambiguous and that a proper construction of the will and codicil is that all the shares of the common stock of the Dickinson Company of Delaware which the testator owned at the time of his death and the identified proceeds of sale of other stock of the said Dickinson Company of Delaware constituted the whole of the trust fund created by article 4 of the will; that the shares of the preferred stock of the Albert Dickinson Company of Illinois, which the testator owned at his death, were not a part of the trust fund, and that this construction of the will and codicil is according to the intent of the testator. A decree was entered in accordance with these findings.

In the foregoing statement we have recited the facts as disclosed without any attempt to distinguish the evidence which was properly admitted from that improperly received. We have found it unnecessary to discriminate in this regard.

Two briefs have been filed in support of the decree, one by the Young Men's Christian Association of Chicago and the other by various charitable organizations and certain legatees who join in presenting their views.

The brief of the Y. M. C. A. of Chicago urges that the proper construction of the 4th clause of the testator's will is that the testator bequeathed "all the shares of capital stock which I now own of the following corporations: The Albert Dickinson Company." ***** The other legatees insist that the proper construction of that clause is:

[illegible]

"I also give and bequeath unto my said nephew, Charles Dickinson Boyles, and the Merchants Loan and Trust Company, as Trustees, and to the survivors of them, for the benefit of my said nephew, all the shares of capital stock which I may own at the date of my decease, remaining from those I now own, of the following corporations: The Albert Dickinson Company, *****"

Charles D. Boyles contends that the language of the testator, namely, "all the shares of capital stock which I may own, at the date of my decease, of the following corporations: The Albert Dickinson Company,***** " is unambiguous and means exactly what it says; that is, that the trust for Boyles was to include all the shares of the capital stock of the Albert Dickinson Company which the testator might own at the date of his decease, and there being no dispute about the fact that he owned the preferred stock of the Albert Dickinson Company at that time, if of necessity follows that the trustees are entitled to take the same and that the court erred in construing the will otherwise.

It is quite impossible to review in detail the numerous cases which have been cited in the exhaustive briefs filed. The parties are agreed that the primary rule in the interpretation of wills is that the purpose of such construction must be to find the intention of the testator as expressed in the words used; that this rule dominates all others, and that for the purpose of ascertaining the true intent the court will sit in the testator's arm-chair. It is also conceded that subject to this primary rule the primary intention rather than a special intention controls; that all words were used for a purpose; that every word will be scrutinized and given effect if possible, and that the whole will must be considered. These and many other rules are supported by the authorities cited.

It is contended in support of the construction adopted by the decree that it carries out the intention of the testator, and in sustaining this contention it is suggested that the original will

gave pecuniary legacies to the amount of \$900,000, about one-half of which went to relatives of the testator; that other than the investment in the Chicago Dock Company there would have been a deficiency of nearly \$400,000 in assets available for payment of the pecuniary legacies; that the shares of the Dock Company which the testator owned when he made his will were worth about \$900,000 and constituted the principal liquid asset of his estate; that if he had intended that Boyles should receive the income of this Dock company stock or any of it, he would have included it among the stocks named in Article IV, but that he did not do this, and consequently it is said to be "apparent that he earmarked that investment for the payment of the pecuniary legacies, so far as necessary, and the balance for the residuary legacies." It is said that when the testator gave to Boyles a life interest in his stock in the Albert Dickinson company, that gift was an interest in a company which owed, or was about to owe, a million dollars, and obviously it was in the mind of the testator to make his bequest to Boyles subject to that debt; that later by the transactions in which Boyles had a part, the equitable interest in the debt, to which Boyle's gift was subject, was converted into the preferred stock which is here in controversy and came into the possession of the testator in that form before the codicil was made.

It is said that before the execution of the codicil Boyles had failed to improve the condition of the Albert Dickinson company and it had suffered great losses and had become involved in the proposed consolidation with the Continental Seed Company; that the Albert Dickinson Company had been sued for an accounting and that the testator had made good about one-third or \$60,000 of the direct loss and had obligated himself under contract to the extent of possibly one-third of \$500,000 more; that the testator's liability to Charles Dickinson on the guaranty contract as to

dividends had changed from a mere possibility to an actuality; that the interest in the semi-liquid debt of the Albert Dickinson Company had become a frozen asset in the shape of preferred stock for which there was no market; that before the codicil was made the testator had taken away his powers of attorney from Boyles, and by the codicil removed Boyles as executor; that subsequent to the execution of the codicil he decided to another nephew real estate which by Article III of his original will he had devised to Boyles. It is therefore inferred that it was because of the unsalable condition of certain real estate and this preferred stock, and not because he intended to give Boyles the preferred stock for life, that the testator, at his attorney's suggestion, included in his codicil the provision that as there might be no ready market for the sale of some of the assets of his estate, the trustees should have a maximum of ten years in which to pay the legacies. It is said there were only two unsalable assets to which the testator could have referred - the Clara street real estate and the preferred stock - and that this provision of the codicil would be impossible of execution if the preferred stock were tied up for Boyles' lifetime and Boyles lived out his expectancy, which was between fourteen and eighteen years; that the testator's sister Frances had an expectancy of less than ten years when the testator died; that the bequest for her life was next to the last of those given by the will to the testator's own relatives; that the codicil provided that the legacies should be paid as rapidly as possible in the order named; that it is unreasonable to suppose that the testator was willing to deprive his sister for the whole of her life of the income of the trust created for her benefit, in order that Boyles might get the income from the preferred stock as well as from the common stock during the fourteen or more years of his expectancy; that if the testator had intended to give Boyles an

The following are the facts as they are known to the writer:
 That the interest in the anti-slavery work of the American
 Company and Society is known to be one of the most
 for which there was no return; that before the work was made
 the Secretary had taken away his power of attorney from his
 and by the action of the Society as a whole; that the
 the Secretary of the Society he should be another person
 first with by article III of his original will he had devised to
 himself. It is therefore inferred that it was because of the un-
 success of the Society of Anti-Slavery and the American
 and not because he intended to give his power to the Society
 first. That the Secretary, of the Society, was not
 his will the Secretary had no power to do so. That
 the Secretary of some of the members of his Society, the
 Society have a maximum of ten years in which to pay the
 of the Society with the Secretary as well as
 the Secretary have received - the Secretary had
 the Secretary as - and that this provision of the original will
 be possible of execution if the Secretary were not to
 the Secretary and his wife and his property, which was
 between the Secretary and his wife; that the Secretary's
 property had an expectancy of less than ten years when the Secretary
 died; that the property of the Secretary was not to the Secretary of the
 given by the will to the Secretary's own relatives; that the Secretary
 provided that the Secretary should be paid as much as possible
 in the first year; that it is unreasonable to suppose that the
 Secretary was willing to receive his share for the whole of his
 life of the income of the trust created for his family, in order
 that his wife and the Secretary should have the property as well
 as the Secretary's share during his lifetime as well as his
 expectancy; that the Secretary had intended to give his power to

interest in the business as distinguished from income, he would have given him the stock himself, or at least have given him full voting power, that on the contrary he not only gave Boyles nothing but the income but vested the title originally in two trustees, of which Boyles was one; that even in the gift of that income the testator made it conditional upon Boyles holding the testator's estate harmless from liability on the guaranty contract held by Charles Dickinson. This income from the testator's stocks under Charles Dickinson's management had amounted to about \$8,000 a year, and the effect of the construction for which Boyles now contends would be to give him this and in addition a prior lien on the corporate assets of the Albert Dickinson Company, for his life, to the extent of about \$45,000 a year income represented by the cumulative dividends on this preferred stock.

It is urged that the same inferences are to be drawn from paragraph 4 of Article IV of the will, which indicates that the testator contemplated the possible sale by himself during his lifetime of the stocks constituting the trust, and from the fact that the will itself conferred power on the trustees to sell these.

From all these facts it is argued that there never was a moment when the testator intended that the income from the preferred stock of the Albert Dickinson Company should go to Boyles.

We are not, for several reasons, impressed with these contentions. In the first place, it appears that Albert Dickinson had the benefit of counsel at the time he drew the will and at the time he drew the codicil, and if it had been his desire or intention to have the liquid asset of stock in the Dock Company applied to the payment of legacies, it would have been an easy matter for him to have said so. He did not say it, and in view of that controlling fact the other circumstances recited are not at all persuasive.

The evidence indicates that Albert Dickinson was a business man of ability; he understood the exigencies of the business and evidently was of the opinion that those exigencies might be such as to make it unwise and inexpedient for him to tie up the available cash or its equivalent belonging to his estate, thus making it possible to wreck the entire business in which he and Boyles were engaged, resulting ultimately in the possibility that the legacies could not be paid at all. He did not earmark the Book Company investment, but on the contrary left it where his executor might make that use of it which would best conserve the business. Undoubtedly he intended that the legacies given by him should be paid, but the codicil shows clearly, we think, that he did not desire that this should be done at the expense of ruin to the business. We are unable to extract from this evidence that lack of confidence of the testator in the business ability of Boyles which the legatees seem to regard as a necessary inference. The fact that in the codicil he named a co-trustee is explained by the testimony of Mr. Hale, who advised it for the purpose of complying with the laws of Florida, and while he removed Boyles as executor of his will, there was a very good reason for that other than any lack of confidence in his business ability, namely, that as executor of the will Boyles might be placed in an inconsistent situation, his duty as executor conflicting with his private interest.

All the extrinsic evidence which was submitted is, we think, wholly insufficient either to establish the intention of the testator that the preferred stock should be devoted to the payment of legacies or to prove a lack of confidence in the business acumen and ability of Boyles. Such inferences rest upon mere conjecture. When the will was executed and later, after most of the matters recited had occurred, the testator had the opportunity to devote

The evidence indicates that Albert H. H. was a
person of ability; he understood the exigencies of the
business and was of the opinion that those exigencies
might be such as to make it unwise and imprudent for him to
take up the available cash of the business before him in his
case, thus making it possible to withdraw the entire business in
which he and H. were engaged, remaining H. H. in the
possibility that the business would not be paid at all. He did not
concur in the H. H. Company investment, but on the contrary felt it
where his executor might have been at it which would have been
the business. Subsequently he indicated that the business
given by the H. H. Co. was not a small matter at all, but
that he did not feel that H. H. should be taken at the ex-
pense of this to the business. He was unable to extract from this
evidence that lack of confidence of the business in the business
ability of H. H. when the business was to be put in a business
investment. But that in the matter he found a confidence in
expressed by the testimony of H. H., who advised in the
purpose of carrying with the loss of H. H., and while he removed
H. H. as executor of his will, there was a very good reason for
that other than any lack of confidence in his business ability.
namely, that as executor of the will H. H. was not to be placed in
an inconsistent position, his duty as executor conflicting with
his private interest.

All the extrinsic evidence which was submitted in, we
think, wholly insufficient to establish the intention of the
testator that the business should be put in the hands
of H. H. or to prove a lack of confidence in the business
and ability of H. H. Such evidence that was not sufficient.
That the will was executed and later, after death of the testator
which had occurred, the testator had the opportunity to revoke

the Peck Company assets or the preferred stock to the payment of legacies. At each time he was acting under the advice of experienced counsel, and just prior to the execution of the codicil he discussed the matter quite fully with Mrs. Dickinson. The fact that neither in the will nor in the codicil did he express the intention, makes it impossible to infer from these facts and circumstances that the intention existed other than possibly as a hope.

If we are correct in this conclusion, the next contention of the legatees (namely, that the changing of the form of the property from liquid assets of the Peck Company into the preferred stock of the Albert Dickinson Company, should not be permitted to defeat the intention of the testator) falls to the ground. It is true that the mere change in form of property devised or bequeathed will not defeat the intention of the testator and that rule has been applied where the property involved was shares of stock in corporations, as shown by the cases cited, namely, Havens v. Havens, 1 Sandf. Ch. (N.Y.) 324; Baldwin v. Baldwin, 7 N. J. Eq. 211, but in these cases the devises were of specific property. As we have already pointed out, if the testator had desired either in will or in codicil to accomplish this result, he could have done so by specifically devoting that part of his property to the payment of the legacies.

The legatees next contend that the language of the first part of the testator's bequest as stated in Article IV indicated a clear intention to refer only to the stock owned by the testator at the time he made his will, and they urge in this connection the proposition that where it is clear from the face of the will that the testator has not accurately or completely expressed his meaning, and it is also clear what the words are which he has

omitted, those words may be supplied. It is, we think, a fair inference from the language used in the will (and if it is not a fair inference it is established by the extrinsic evidence) that the testator in the fourth clause of the will referred to stocks which he owned at that time. The whole language of the section, as well as other parts of the will, indicates this; and we know it is true because the section expressly referred to stock which had been deposited with Babson under the guaranty. However, when we consider the language of the will it is just as clear that the testator also referred to stocks in those companies which he might own at the time of his decease. No other possible construction can be given to the phrase, "all the shares of capital stock which I may own, at the date of my decease;" and we think the difficulty in construing this section will disappear when note is taken of the fact that the language of the will is to be applied, first, to stock which the testator owned at the time he made the will, and, second, to the stock which he owned at the date of his decease. The legatees say:

"Strange as it may seem, the Hoyles trust would not receive a share either of the stocks of the companies named in the will, which the testator owned when he made his will, or of the stocks for which those stocks were exchanged, if the literal language of the first clause of the bequest were followed."

It must be conceded, we think, that the literal language of this first clause gives to the Hoyles trust all the shares of the capital stock which the testator ^{may} own at the date of his decease in the named companies; and that language is so clear and unequivocal that it cannot be explained away; but it by no means follows that this is all the stock the Hoyles trust would receive under that provision.

There is another clause in this Article which states, "or the shares of stock in any corporation or corporations for which I may have exchanged said stocks during my lifetime." Here

...these words may be supplied. It is, we think, a fair
inference from the language used in the will (and it is not a
fair inference if it is established by the extrinsic evidence) that
the testator in the fourth clause of the will referred to words
which he uttered at that time. The words language of the section, as
will be clear from the will, indicated this; and we know it is
true because the section expressly referred to words which had been
uttered by him under the will. However, when we consider
the language of the will it is just as clear that the testator also
referred to words in those paragraphs which he uttered at the time
of his death. In other possible construction can be given to the
words, "all the shares of certain stock which I now own, at the date
of my decease;" and we think the difficulty in construing this sec-
tion will disappear when note is taken of the fact that the language
of the will is to be applied, first, to stock which the testator
owned at the time he made the will, and, second, to the stock which
he owned at the date of his decease. The language says:
"Whereas as it may seem, the Royal trust would not receive
a share either of the stock of the companies named in the will,
which the testator owned when he made his will, or of the shares
for which there might have been money, if the Royal trust were
the first choice of the parties who received."
It must be noted, we think, that the language in-
cludes of this kind of stock given to the Royal trust all the shares
of the capital stock which the testator owned at the date of his de-
cease in the named companies; and that language is as clear and un-
equivocal as it could be explained away; but it is by no means self-
evident that it is all the stock the Royal trust would receive under that
provision.
There is another clause in this will which states
"of the shares of stock in any corporation or corporations for
which I may have exchanged said stock during my lifetime." Here

the double aspect in which the testator regarded this bequest is made to appear. We do not think it is ambiguous at all if we remember the actual situation, which was that the parties contemplated the organization of a holding company which would take title to all these shares of stock. That event might, as the testator at the time of the execution of the will knew, take effect before his death. If any part of the stock of any one of these named companies was transferred to the holding company, the form of the property would be changed but its value and essential character would not be affected. The stock might have value as representing shares in the original companies or as representing shares in the holding company to be organized, but it would not have value as to both, and we think the plain meaning of this paragraph, in view of the situation which existed, is that the changing of the stock from the individual companies to the holding company would make no difference as to the bequest. Whether the one condition or the other existed, the shares of stock would become a part of the trust for the benefit of Boyles.

Whether the word "or" much discussed in the briefs with numerous citations of authorities, shall be construed as "or" or "and" would make no difference in our opinion. We cannot agree with the contention of the legatees that the use of this word "or" in introducing the clause which follows it creates an alternative disposition of this stock which would put Boyles to his election, as the whole language of the will precludes any such construction. If an alternative bequest had been intended, certainly there would have been some provision in the will describing the means by which the election should be made or the alternative should be exercised. No such provision is found either in the will or in the codicil, and apparently both were prepared by lawyers "learned in the law."

Much is made of paragraph 4 of Article IV, which speaks of the shares of stock constituting the trust estate as being sold,

the article passed in which the Senator reported this passage in
 said to report. We do not think it is ambiguous at all if we re-
 spect the actual situation, which was that the various corporations
 the organization of a holding company which would take title to all
 these shares of stock. That every night, as the Senator at the
 time of the amendment of the bill knew, took effect before his
 death. If any part of the stock of any one of these named companies
 was transferred to the holding company, the form of the property
 would be changed but its value and essential character would not be
 affected. The stock might have value as representing interest in the
 actual companies or as representing interest in the holding company
 in its organized, but it would not have value as such, and we think
 the plain meaning of this paragraph, in view of the situation which
 existed, is that the changing of the stock from the individual own-
 ers to the holding company would make no difference as to the
 interest. Whether the new condition of the stock existed, the shares
 of stock would become a part of the trust for the benefit of the
 estate. Whether the word "or" much mattered in the State
 this question of the relation of the word "or" would be decided as to
 it "and" would make no difference in our opinion. We cannot agree
 with the contention of the lawyers that the use of this word "or"
 in introducing the clause which follows is evidence of intention
 of exclusion of this stock which would not apply to the situation,
 as the whole language of the bill presumes any such connection.
 If an alternative passage had been intended, certainly there would
 have been some provision in the bill describing the means by which
 the election should be made as the alternative should be mentioned.
 No such provision is found either in the bill or in the act itself, and
 separately both were passed by the Legislature in the law.
 There is no such provision in the bill or in the act itself, and
 of the shares of stock constituting the trust estate as being sold

exchanged or otherwise disposed of, before or after the death of the testator and directs that in case of such sale or exchange the same shall be passed to or be retained by the trustees upon the same trust as therein provided. What we have already said covers this point, and we think the difficulty disappears when the double aspect in which the testator undoubtedly regarded the property devoted to this trust is considered. It is apparent, however, from the manner in which the testator and others treated the stocks referred to in this bequest during his lifetime, that he had no intention whatsoever of impressing the same with a trust prior to his death. This appears clearly from the fact that when stock amounting to \$21,000 in the Delaware Company was sold for cash, the testator, although then acting under the advice of a lawyer, did not set aside the same or attempt to earmark it in any way.

We find nothing in the subsequent language of this will construed in the light of the extrinsic evidence indicating that the original bequest is in any way modified or controlled by the subsequent language of Article IV or any part of the will. It will therefore be unnecessary to examine the numerous cases cited on that point.

The legatees, however, further contend that the words "all capital stock" as used in Article IV of the will should be construed to mean only all common capital stock. They base this contention upon the extrinsic evidence to the effect that the only stock of the Albert Dickinson Company at the time the testator made his will was common stock; that none of the Dickinson companies had ever issued preferred stock and did not have such issue in contemplation at the time; that the preferred stock which afterwards issued, was substituted for the debt of the Albert

Dickinson Company to the Chicago Dock Company which (they again assert) was designed by the testator for someone other than Boyles, and, describing the different qualities of this stock, they say that the preferred stock was in effect a debt which could not be called for payment. As a matter of fact, the stock could be called, and, if paid in full, it left the holder of the preferred stock without further interest in the assets of the company.

It is said that it was evidently not intended to be a permanent share of the capital of the company, but was a temporary expedient to remove the callable feature of the demand loan; that from the mere fact that it was designated as "stock" it would not follow that it was included within the designation of the word as used by the testator.

These observations would not be without some force if it were not for the controlling fact that after the issuance of this preferred stock the testator executed the codicil to his will. It is unnecessary, we think, to discuss at length the nice distinctions of the cases cited as to how far the execution of the codicil, if at all, amounted to a republication of the will. The competency of the testator to execute a codicil is not questioned and cannot be, but it is said that he was not competent enough to understand and republish his will. We think that contention is hardly sustained by the evidence, but even if it were, we do not think that fact would be controlling. There is no evidence tending to show that Albert Dickinson at the time of the execution of this codicil did not understand the distinction between the common and the preferred stock. He may not have been able to keep in mind all the different charitable institutions that he wished to remember and their necessities and the wisdom of his bequests to them, but he understood that he did not wish Boyles to act as the executor of

Blackman Company as the Chicago Book Company which (they said) was designed by the testator for someone other than Wiley, and, assuming the different position of this stock, they say that the preferred stock was in effect a debt which could not be called for payment. As a matter of fact, the stock could be called, and, it said in 1911, it left the matter of the preferred stock without further interest in the assets of the company. It is said that it was evidently not intended to be a permanent share of the capital of the company, but was a temporary expedient to remove the salable feature of the common stock; that from the mere fact that it was designated as "stock" it would not follow that it was included within the designation of the word as used by the testator. Those observations would not be without some force if it were not for the controlling fact that after the issuance of the preferred stock the testator executed the will in his will. It is unnecessary, we think, to discuss at length the fine distinction of the cases cited as to how far the execution of the will, the competency of the testator to execute a will is not questioned and cannot be, but it is said that he was not competent enough to make such and revocable his will. We think that contention is hardly well founded by the evidence, but even if it were, we do not think that that would be controlling. There is no evidence tending to show that Albert Blackman at the time of the execution of this will did not understand the distinction between the common and the preferred stock. He may not have been able to read all the different charitable institutions that he wished to remember and their necessities and the wisdom of his bequests to them, but he understood that he did not wish Wiley to get an interest of

his will, and if he knew that much he also knew whether he desired to have the preferred stock placed in a trust where Boyles would get the benefit of it. We may not altogether disregard the effect of the execution and publication of this codicil. In Left v. Stearns, 234 Mass. 273, discussing the execution of a codicil as a republication of a will as of that date, the court said:

"This principle does not rest upon the presence in the codicil of technical words in terms affirming and republishing the original will, but upon the broader consideration that the execution of an instrument denominated a codicil imports in the mind of the person executing the codicil the existence of a will which can be supplemented and modified, and that the reference in a codicil to a will implies the continuance or vivification of that writing as a vital testamentary disposition and the re-adeption or original declaration of its provisions."

In Dunn v. Kearney, 288 Ill. 48, our Supreme Court said:

"While the execution of a codicil operates as a republication of the will, yet a codicil does not operate to alter the original will except where it so designates."

In Jarman on Wills (6th ed.) p. 206, the editor says:

"At the present day, however, the tendency of the courts seems to be to give greater effect to republication than Mr. Jarman thought warranted by the old authorities."

It would be a useless task to review at length all the different cases. Whether we consider this decree from the standpoint of the extrinsic evidence introduced, from a fair and reasonable construction of the entire language of the will, or in the light of both the language of the will and the extrinsic evidence, we think the court erred in holding that the preferred stock of the Albert Dickinson Company did not pass to the trust created under Article IV of the will, and for that reason the decree will be reversed and the cause remanded with directions to enter a decree in conformity with the views expressed herein.

REVERSED AND REMANDED.
WITH DIRECTIONS.

O'Connor and McSurely, JJ., concur.

MASSACHUSETTS BONDING AND INSURANCE
COMPANY, a Corporation,

Appellee,

vs.

STANDARD TRUST AND SAVINGS BANK,
a Corporation,

Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

One Frank T. Joyner was appointed receiver of the Midland Casualty Company by the Circuit court of Cook county on May 19, 1917. At different times thereafter he gave bond as required by the court with the Massachusetts Bonding and Insurance Company as surety. As such receiver he opened an account with the defendant Standard Trust and Savings Bank and from time to time deposited in this account funds coming into his hands as such receiver. Thereafter Joyner defaulted in his accounts as receiver to the amount of \$33,296.84, absconded and his whereabouts are unknown. He was removed as receiver and the Chicago Title and Trust Company appointed in his stead.

In compliance with an order of the court, the Massachusetts Bonding and Insurance Company paid the amount of Joyner's defalcations and by decree of that court was subrogated to the rights of the Chicago Title and Trust Company as successor to the receiver. It then filed its bill to establish the liability of the defendant bank upon the theory that Joyner drew checks against his account in favor of the bank in payment of his personal obligations to it and for his own personal use, which the bank paid with knowledge of such facts. The bill prayed an accounting and a decree for the amount due.

The bank answered, denying the equities of the bill, and the case was put at issue and thereafter referred to a master

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We thank L. J. Fox for his helpful comments on this manuscript.

...in his name.

It is requested that you advise the Bureau of the results of your investigation.

The bank answered, denying the existence of the bill.

to "take the testimony herein according to law on the question of the liability, if any, of the defendant herein, and that said master file his report herein covering the testimony, together with his conclusions of fact and law on said question and thereafter await the further order of court."

The master reported his findings at length as to numerous transactions, but found that complainant failed to prove the material allegations of its bill by a preponderance of the evidence; that defendant was therefore not liable and recommended the bill be dismissed for want of equity. Objections filed before the master were over-ruled and, upon the hearing before the chancellor, stood as exceptions. The chancellor in part sustained and in part over-ruled these exceptions and found a liability against the bank to the amount of \$21,618.35, for which sum a decree was entered. This decree the bank seeks by this appeal to reverse.

The decree finds the defendant liable for the alleged misappropriation of a check for \$34 dated December 7, 1917, and the defendant contends that this finding is not sustained by the evidence. The check itself was offered in evidence. It is to the order of the defendant bank and in the handwriting of Joyner, the receiver.

James M. Niles, a nephew of the receiver, was at this time a vice-president of the defendant bank. He was thereafter convicted on a charge of embezzlement and sentenced to the penitentiary at Joliet. He was produced at the hearing by a writ of habeas corpus and testified in regard to this transaction that the said notation appearing on the check, "Discount Teller, Dec. 7, 1917," indicated that the check was received by the defendant bank and applied by way of interest or discount; that the check indicated on its face that it was charged to Joyner's account as receiver and that the bank received the money.

One Kuhn, a cashier of the defendant bank, was called

to take the testimony herein according to law on the question of
the liability, it may, of the defendant herein, and that said
master this his report should be made, and the testimony
with his conclusions of fact and law on said question and there-
after await the further order of court."

The master reported his findings of fact, as to
the various transactions, and found that the defendant failed to prove
the material allegations of the bill by a preponderance of the
evidence; that defendant was therefore not liable and recommended
the bill be dismissed for want of equity. The defendant failed to
show the master was satisfied and, upon the master's report, the
court, upon its consideration, the defendant is not satisfied
and is not satisfied with the evidence and found a liability against
the bank in the amount of \$21,412.50, the same was a loan was
made. This leaves the bank liable by this amount to pay.
The master finds the defendant liable for the alleged
misrepresentation of a check for the stated amount of \$21,412.50, and the
defendant's evidence that said check is not sustained by the evidence.
The check itself was altered in violation.
It is the order of the defendant bank and in the amount of \$21,412.50
against the defendant.

James M. Allen, a member of the receiver, was at this
time a vice-president of the defendant bank. He was introduced
on a charge of embezzlement and was found by the court
guilty as charged. He was ordered to pay the bank by a bill of
exchange and settled in regard to this transaction that the
bank received a check for the same amount as the bill of exchange.
The master finds that the check was received by the defendant bank
and mailed by way of interest or discount; that the check had
been on the fact that it was mailed to Turner's account as re-
ceiver and that the bank received the money.
The bank, a co-defendant of the defendant bank, was called

as a witness and questioned in regard to this check and other matters in connection with the business of the defendant bank. He stated that there was no way of ascertaining what the \$54 was for, ^{after} and further questioning counsel for the defendant, "to save time and ascertain the facts," stated that he would produce everything out of the bank records that had any bearing on any of the issues of the case, without subpoenaing witnesses, and that he would go over the transcript and see just what information was called for on behalf of the complainant. Thereafter he submitted a letter which was by stipulation received into the record. Counsel for the defendant stated: "The letter tells the whole story and speaks the truth. I wrote the letter and it states the facts." Whereupon Mr. Ferguson asked, "These are facts of the bank's accounts?" and Mr. Long answered yes. This letter says: "The bank's records of December 7, 1917, show the receipt of \$54 as partial payment of a note of \$204, signed by W. E. and Eva B. Joyner."

The entire loan account of Joyner with the bank was also put in evidence and disclosed the application of the \$54 item to that account. It also appears that on that date Joyner had no funds in his personal account with the defendant bank.

The defendant contends that there is no proof that Joyner, the receiver, gave this check to the bank in part payment of this note nor proof that it was applied on the note of W. E. and Eva B. Joyner. The bank says that it is fair to infer that if Frank T. Joyner presented the check to the bank, he did so for the purpose of payment; that he received the money on it, and that this is not an unusual practice, since Frank T. Joyner was known to the discount teller; that the record of the bank would have been the same whether currency was paid on the check or whether the check was applied in partial payment of the note. It is further urged that if the check was used by W. E. and Eva B. Joyner in part payment

of the note, the inference would be that the same was in their possession rightfully and for a good consideration, there being no proof to the contrary. It is also suggested that W. E. and Eva E. Joyner, or one of them, may have given \$54 in money to the receiver and got his receiver's check in return, and that this is not an unusual practice, or that possibly there may have been some other consideration for the check. It is insisted that this appears the more reasonable since the evidence shows that the different members of the Joyner family were dealing with each other, and defendant says: "Why infer that the bank acted dishonorably and became a party to a plain fraud when inferences of honorable conduct are just as reasonable? Fraud is a fact to be proven as any other fact."

There might be some weight to these arguments if the check presented was to the order of either W. E. or Eva E. Joyner, but it is in the handwriting of Frank T. Joyner and is payable to the order of the defendant bank. It is also undisputed that he was liable on the note as an endorser and that the original transaction was with him through the discounting of the note with the defendant. We think that these inferences (which defendant suggests) must be regarded as somewhat fanciful in view of the fact that the statement which appears in the record is by defendant's own counsel. It is quite true that the transaction might possibly have been carried out in the different ways suggested, but this would have been quite unusual under the circumstances, and if any such unusual facts existed it is inconceivable that in the writing of this letter these unusual facts would not have been stated. It is not unfair, we think, to assume that the letter of the counsel stated all the facts which could be properly and appropriately stated and which were favorable to the defendant. Such a statement made after deliberation by a defendant and through the advice of counsel must be strictly construed against the party in whose favor it is made. No:

can we accede to the further contention of defendant that "there is no proof that any officer or executive of the bank had any knowledge of the transaction," since such a conclusion is entirely inconsistent with this statement of its counsel. The counsel spoke for the bank, and the bank is bound, therefore, by the statement. Since the transaction was by the duly constituted agents of the bank, the presumption is that these agents acted within their lines of duty until the contrary is shown. Northwestern Nat'l Bank v. Madison & Edzie St. Bank, 242 Ill. App. 22; Lowndes v. City Nat'l Bank, 82 Conn. 8, 72 Atl. 150.

We think the court was justified in finding that when the defendant received this payment of \$54 from Frank T. Joyner by his check as receiver, defendant knew that Joyner was thereby converting the funds of the receivership to his own use for the purpose of applying the same upon an obligation that was then due to the defendant and that the defendant was therefore liable to complainant for said sum of \$54. Allen v. Puritan Trust Co., 211 Mass. 409; 97 N.E. 916, L. R. A. 1915, C. 518.

Defendant next contends that the court erred in finding a liability against the bank in the amount of \$3600, in connection with a transaction of June 29, 1918.

The decree finds that on that date Joyner told Miles that he, Joyner, had withdrawn \$3600 from the receivership account without an order from the court; that he was about to make an accounting and for that purpose wished to restore the amount temporarily; that the defendant then loaned Joyner \$3500 individually and credited it to his receivership account; that on July 3, 1918, Joyner as receiver made a check for \$3500 to his own order, endorsed it and delivered the same to the defendant for payment to itself; that on July 5th the defendant did pay itself by charging

this check to the receivership account.

The defendant contends that this finding is not sustained by the evidence. It is admitted that Joyner borrowed \$3500 from the bank on June 29, 1918, and that this money was deposited to the credit of his account as receiver after first passing through his individual account.

A note for this amount was signed but whether by Joyner individually or as receiver, or whether it was a note by a third party does not appear, there being no record of the loan in the discount or loan records of the bank for the reason that this was a temporary loan carried as cash. There is no question that this note was paid by the check of Joyner as receiver on July 5th and the fair inference from the statement in regard to the transaction made in the letter by defendant's counsel is that the note was the individual note of Joyner. It would have been so made in the usual course of business, and had the fact been otherwise the letter would no doubt have so stated.

The evidence of Miles tends to show that Joyner at the time of this transaction told him that the \$3500, to which he claimed to be entitled for receivership fees, had been withdrawn on the advice of his attorney. Former Judge Cleland, who was the attorney for the receiver at this time, testified in the case, but he was not questioned on this matter.

The finding of the master on this point, which the defendant asks be accepted, is to the effect that when Joyner procured the loan of \$3500 and deposited the proceeds in his account as receiver, defendant was not bound to regard it as a personal contribution of Joyner to the receivership account but was justified in assuming that the loan and the placing of the proceeds of it in the receivership account were both receivership transactions; that the bank was therefore justified in accepting

this check to the receiver's account.

The defendant contends that this check is not sustained by the evidence. It is admitted that the check was cashed from the bank on June 20, 1918, and that this money was deposited in the credit of his account as receiver after the cashing of the check.

A note for this amount was signed but without any further indorsement or as receiver, or whether it was a note by a third party does not appear, there being no record of the fact in the account or cash records of the bank for the reason that this was a temporary loan carried as cash. There is no question that this note was sold by the check of the receiver as receiver on July 2nd and the fact appears from the evidence in regard to the transaction made in the letter by defendant's counsel is that the note was the subject of a sale of the note. It will not be in the usual course of business, and that the fact was admitted the father would not have been raised.

The evidence of Alice Jones is that she paid to the time of this transaction told him that the \$250.00 which he claimed to be entitled for receiver's fees, had been withdrawn on the credit of his account. James Edgar Williams, who was the attorney for the receiver at this time, testified in the case, but he was not produced on this matter.

The finding of the court on this matter, which the defendant asks be reversed, is to the effect that when James Williams the loan of \$250.00 was advanced the proceeds in his account as receiver, defendant was not bound to report it as a receipt, and that it is the receiver's account that was credited in accounting that the loan was not being of the proceeds of it in the receiver's account was held receiver's transactions; that the bank was therefore justified in accounting

the check of Joyner as receiver in payment of the loan. It is claimed that the finding of the master in this respect is consistent with the law as laid down in Bank v. Hyde Park, 101 Ill. 595. We do not accede to this view.

The loan of June 29th was for the purpose of replenishing the trust fund, and Miles, vice-president of the bank, was so informed. When the bank loaned Joyner the money on credit other than that of the receivership for the purpose of replenishing the receivership account, this money was passed into that account and became a part of the trust fund clear of any claim of the bank against it, just as much as if it had been obtained by Joyner from some other source. By accepting this \$3500 as a deposit in the receivership account, defendant estopped itself from thereafter claiming that the same was not a part of the trust fund.

Custer County v. Walker, 10 S. D. 594, 74 S. W. 1040, is a case in which a similar situation was considered. There a bank which held an account with the county treasurer made a personal loan to him, which was deposited in his account as treasurer. The court said:

"When the bank accepted the \$1,000 loaned as a deposit in the name of Tunley as county treasurer, it then lost its right to hold a lien upon it for any balance that might become due it from Tunley as an individual. The money then became the money of the county, and was no longer subject to his individual debts. State v. McEstridge, 84 Wis. 473, 54 N. W. 1998."

The Supreme court of Kansas made a similar ruling in the case of Washburn v. Linseott St. Bank, 87 Kan. 698, 125 Pac. 17. Nor is Bank v. Hyde Park, *supra*, contrary, as defendant contends. In that case one Waldron was a city treasurer who deposited the funds coming into his hands as such treasurer in his personal account, and while the account was in his name borrowed on his personal note money from the bank to be used for the purposes of the Village of Hyde Park to pay warrants in anticipation of the collection of taxes. The account was thereafter changed and kept under

the name of Waldron as treasurer, and by means of checks thereafter drawn as treasurer, Waldron paid the bank \$37,959.96 on account of the loans which had been previously made to him in his individual name but in behalf of the city. It was there held, - two of the Judges dissenting - that the bank was not liable. That case is clearly distinguishable from the instant one, in that the loans made by Waldron were authorized and for the benefit of the trust estate, while here the loan was a personal one to the receiver for the purpose of permitting him to make a showing of additional assets that would cover up an improper payment. A receiver, whether with or without the advice of his attorney, who pays fees to himself from the estate without an order of court, does so at his own risk; and a bank which assists him in such an appropriation cannot claim that it has acted for the benefit of the estate. On this item the defendant is clearly liable because it accepted a check of the receiver on the trust estate for a debt due defendant from the receiver personally.

Defendant next complains that it is held liable on account of a transaction of November 13, 1919, in which the bank (which at that time held two past due notes of Joyner, one for \$2975 and the other for \$975) paid both of these by charging the same against the receivership account. It is admitted that the bank had no right to do this, and it is not denied that its action in this respect amounted to a conversion of the funds. Defendant says in substance, however, that this transaction was consummated without authority from the president of the bank, and it is suggested that the transaction was due to the ignorance of a teller who received Joyner's receivership checks on that date in payment of his personal notes. This view of the matter is hardly sustained by the evidence, which indicates that the president of defendant bank did not know about this transaction, but does not

The issue of whether the transaction was a bona fide sale or a loan is a question of fact. The evidence in this case is conflicting. The fact that the money was paid to the defendant in cash, and the fact that the defendant was not a member of the plaintiff's organization, are factors which tend to support the view that the transaction was a loan. On the other hand, the fact that the money was paid to the defendant in cash, and the fact that the defendant was not a member of the plaintiff's organization, are factors which tend to support the view that the transaction was a bona fide sale. The court is of the opinion that the evidence is more convincing in support of the view that the transaction was a bona fide sale.

The defendant's contention that the transaction was a bona fide sale is supported by the fact that the money was paid to the defendant in cash, and the fact that the defendant was not a member of the plaintiff's organization. The plaintiff's contention that the transaction was a loan is supported by the fact that the money was paid to the defendant in cash, and the fact that the defendant was not a member of the plaintiff's organization. The court is of the opinion that the evidence is more convincing in support of the view that the transaction was a bona fide sale.

disclose the facts with reference to other officials. It does not seem probable that an ignorant teller, without directions from some person of authority, would have made the credits necessary to complete this transaction. However that may be, the defense of the bank is that on December 8, 1914, the president of the bank, desiring to correct the mistake of the teller, required Joyner to make good in the matter by depositing \$3950 in the receivership account. The evidence, however, discloses that on the same day this deposit was made by Joyner, he took the same amount out of the account by means of two checks, one for \$2975, the other for \$975, drawn to the order of currency.

The defendant urges that an inference that this \$3950 was withdrawn for the purpose of making the deposit is an unjustifiable guess, without any evidence whatever to support it. In view of all the circumstances, we do not regard the inference as entirely unjustifiable. The record shows that Joyner's notes were past due and that this was not an unusual situation in his loan account. There is every reason to infer from the evidence that Joyner was not a man of independent means but in failing circumstances at this time. Moreover, since the defendant admits prima facie its liability as to this item and presents an affirmative defense of reimbursement, we think the burden of proof was upon the defendant to show that the account was reimbursed. Reimbursement is not established by evidence that the receiver drew out and put in \$3950 on the same day. As the plaintiff suggests, if it was the purpose in good faith to undo what happened on November 18th, all that was necessary was to order the bookkeeper of the bank to strike out the item of \$3950 entered against the receivership account on that day. Insofar as this item is concerned, we think it was necessary for the defendant to establish the affirmative defense pleaded; having failed to do so, the decree rightly finds it liable.

178. Given to the order of authority.

Defendant next complains of a liability for \$2,000 which the decree finds on account of a transaction on May 12, 1919. It appears that on that date Joyner drew his check for that sum to the order of W. M. Calvin and Company on the defendant bank and signed the same personally. This check came to the personal attention of Miles, vice-president of the bank, who was in charge of the transactions between the bank and Joyner. Miles wrote his initials, "J. M." upon this check and also wrote with a lead pencil after Joyner's name, "Rec." The check was then charged to Joyner's receivership account. At this time Joyner did not have funds in his personal account sufficient to meet the check. Miles testified that he called Joyner on the 'phone and Joyner told him that he had intended to sign the check as receiver and that he would come over later and so sign it. Miles said that he wrote in "Rec." pursuant to the direction and on authority of Joyner given by 'phone. As a matter of fact, Joyner never signed the check as he promised to do, although he never made any complaint about the payment of the same out of the receivership fund.

The evidence shows that the check was delivered and applied upon the personal account of Joyner who was then carrying on speculative transactions in securities and cotton through this firm as brokers. There is evidence from which we think the court was justified in finding that Miles had notice of these facts. Miles was gull indeed, the evidence indicates, if he was not reasonably certain that the payment of this check amounted to a misappropriation of the trust funds in the receivership account. The court finds that he did know and that the bank is chargeable with the knowledge of Joyner in this respect. We are not able to say that the finding is clearly and manifestly against the evidence.

Complaint is also made of an item of liability as found by the decree on account of a transaction had on July 11,

Testimony of witness at a hearing on May 11.

After the hearing there is a record of a transaction on May 11.
It appears that on that date James knew his check for
that was to the order of W. E. Davis and Company on the following
date and signed the same accordingly. This check was in the
possession of James at the time, vice-president of the bank, who was in
charge of the transaction between the bank and James. This
check was issued to "J. E." upon this check and was made with a
face payable to "J. E." name, "J. E." The check was then changed
to James's personal account. It was then given to him
have funds in his personal account sufficient to meet the check.
James testified that he called James on the phone and James
told him that he had intended to give the check to James and
that he would come over later and see him. James told him he
was in "J. E." possession to the check and an endorsement of "J. E."
and "J. E." name. As a matter of fact, James never signed the
check so he presented it to, although he never made any complaint
about the payment of the check out of the trustworthy fund.
The evidence shows that the check was delivered and
applied upon the personal account of James who was then carrying
on a business transaction in connection with other business. This
time as before. There is evidence to show that the check
was applied in the bank and James had notice of these facts.
James was still intact, the evidence indicates, it was not
necessarily certain that the payment of the check amounted to a
violation of the trust funds in the trustworthy account. The
court finds that he did know and that there is no dispute with
the knowledge of James in this respect. We are not able to say
that the finding is clearly and convincingly against the evidence.
Conclusion is also made of an item of liability as
found by the court on account of a transaction had on May 11.

1913. In that transaction the defendant bank transferred \$1,500 from the receivership account of Joyner to his personal account. The basis of this transaction was a check which is in the handwriting of vice-president Miles. Miles testified that Joyner 'phoned to him that he was going to Green Bay, Wisconsin, and asked him to make a transfer of this amount from his receivership account to his personal account, promising that when he, Joyner, came back he would give Miles "his regular check for it." Miles thereupon made the transfer, writing the necessary check. With reference to this transaction Miles was asked:

"Well, you knew at that time there was not any \$1,500 in his personal account, did you not? A. Yes, sir, no doubt I did know that.

Q. And that this check was being transferred to the personal account to be used for his personal purposes? A. Temporarily, I knew that."

Miles further said that he did not know what Joyner did with this \$1,500 and stated that he did not know that Joyner was at this time misappropriating the receivership funds; that Joyner said he was going out of town that evening and he wanted the transfer of that amount from his receivership account to his personal account; that when he came back he would give his check as receiver for the transferred amount, which check was never given. The defendant says, however, that as Miles did not know what Joyner did with the \$1,500 nor what he was going to do with it and did not know that he was misappropriating the receivership funds, it could not be said that the bank had knowledge that the transfer was made for the purpose of consummating a misappropriation by Joyner of the receivership funds. It is also argued that Joyner not only authorized but ratified the action of Miles by receiving the cancelled check with the monthly statement of his account and making no objection to it.

The evidence shows, however, as complainant points out, not one wrongdoer in this matter but two, namely, Miles and

Joyner, and it is difficult to conceive of any theory upon which the ratification of the acts of one wrongdoer by the other wrongdoer could make the action right. It may be that Joyner, so far as he was personally concerned, might obligate himself in this way, but the wrongful act was a wrong to the trust estate, not to Joyner personally, and this evidence shows conclusively that Miles and Joyner participated therein. Cases holding this view are collected in Duckett v. National Mechanics Bank, 96 Md. 400, 38 Atl. 903.

The knowledge of Miles as to Joyner's personal use of these receivership funds was acquired in the regular course of his duties as vice-president of the bank, and the bank is therefore charged with the knowledge of Miles in these respects. The fact that Miles in other transactions stole money from the bank and was convicted on the complaint of the bank, would not change the rule. Tatum v. Comm'l Bk. & Tr. Co., 193 Ala. 120, 69 So. 508, L.R.A.1916, C 767; 1st Nat'l Bk. of Monmouth v. Dunbar, 116 Ill. 625; 1st Nat'l Bk. v. Burns, 88 Oh. St. 454, 103 N. E. 93, 49 L.R.A. (N.E.) 764; Emerald Farmers Elevator Co. v. Farmers Bk., 30 N. D. 270, 127 N.W. 522.

Out of the receivership account and upon the personal check of Joyner the defendant paid the following:

December 18, 1917, \$15, to Cleland, Lee and Phelps.
 December 31, 1917, \$100 to T. J. Hurley.
 February 4, 1918, \$95.50 to O. M. Karraker.
 February 4, 1918, \$6.87 to W. E. Cannady, Cas.
 January 2, 1918, \$11 to Union League Club.

At the times of all these payments Joyner had no funds in his personal account in the defendant bank. These facts prima facie establish a liability which there is no proof in the record tending to overcome. The court therefore properly found a liability on the defendant as to each of these items. As to one of the checks it is claimed that the failure to sign as receiver was an inadvertence but there is no proof of this, and the burden in this respect was upon

the defendant. We think there can be no question of liability as to these items. Defendant had no more right to pay a personal check of Joyner out of the receivership account of Joyner as receiver than it would have had to charge the same to any other account in the bank.

Defendant also complains of a finding of liability on the sum of \$221.75 on account of a transaction of December 19, 1918, on which date Joyner as receiver drew a check for that amount which defendant received in payment of five drafts aggregating the same amount, these drafts being made payable to the order of Joyner personally. At the time of this transaction Joyner was indebted to the bank for these drafts, and the application of a receivership check to the payment of the same amounted in substance to the payment of a personal obligation of Joyner to the bank out of the receivership funds.

We think the decree also properly finds that defendant is liable in the further sum of \$204.31 in a transaction of May 28, 1919, in which Joyner issued a check as receiver for that amount, and thereby appropriated that sum from the receivership account in payment of a draft against Joyner drawn by the First National Bank of Harrisburg, Illinois. This transaction was such that the bank, through its agent handling the matter, could not have been without knowledge that the effect was to apply the assets of the trust fund to the satisfaction of a personal liability against Joyner.

Defendant also complains of Finding No. 29 of the decree with reference to the payment by it of a list of checks which are classified in groups from "A" to "F" inclusive. These include two checks to F. J. Hurley and Company aggregating \$250; nine checks for household expenses of the Joyner family aggregating \$915.30; thirty-four checks to the Union League Club aggregating \$230.70; sixteen checks drawn to the order of currency or to Frank T.

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the People of the East (CLPE) in the United States.

1. The first of these is the fact that the Government has been unable to obtain the necessary information from the various sources to which it has been directed to refer. This is due to the fact that the Government has been unable to obtain the necessary information from the various sources to which it has been directed to refer.

• 2000

1. The above information was obtained from a confidential source who has provided reliable information in the past.

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the People of the South (CLPS) in the United States.

Joyner's own order, aggregating \$1,065.50; eight checks with miscellaneous endorsements aggregating \$40; eighteen checks to miscellaneous payees aggregating \$11,864.80, making a total of eighty-seven checks amounting to \$13,865.30. The decess finds that all these checks (with two exceptions hereafter noted) were paid out of the receivership account used by Joyner for personal purposes; that from the face, form and contents of the checks, with the knowledge already acquired by the officers of the defendant bank in other transactions as to Joyner's misuse of the receivership funds, the defendant was chargeable with the knowledge that in paying them it was participating with Joyner in misappropriation of the trust fund and was therefore liable. Defendant says that as to the sixty-nine checks aggregating \$1,910.40, there is no proof that the bank knew when it paid the same what the checks were for and that at that time it did not know that they were used by Joyner for personal purposes. As to the Hurley checks, Miles knew that F. J. Hurley and Joyner were copartners in a small business at that time. Defendant is charged with that knowledge.

As complainant points out, the evidence indicates that as to nine of the checks described as "Joyner family and household checks," three went to the family grocer, one to the Rogers Park Woman's Club in payment of dues, one to Carson, Pirie, Scott & Co. in payment of Mrs. Joyner's account with the store, one to the People's Gas Light and Coke Company for gas supplied to Joyner's residence, and one to the Commonwealth Edison Company for electric service at Joyner's home. There could be little doubt what the thirty-four checks paid to the Union League Club were for, and if there should be any doubt there is evidence from which the court could find that the checks were for personal expenses of Joyner. The sixteen checks to currency were paid in cash, and the eight currency checks for \$5 each bore miscellaneous endorsements.

Japan's own action, amounting to \$1,000.00; eight checks for nine
 million yen amounting to \$1,000.00; eight checks for nine
 million yen amounting to \$1,000.00, making a total of eight
 million checks amounting to \$1,000.00. The checks listed are all
 drawn checks (with two exceptions hereafter noted) were paid out of
 the Treasury account used by Japan for personal purposes; that
 from the time, from and contents of the account, with the knowledge
 already acquired by the officers of the Japanese bank in Japan
 transactions as to Japan's account of the Treasury bank, the
 elements are identical with the knowledge that in paying them it
 was dealing with Japan in its representation of the bank's
 and was acting as its agent. The checks were paid out of the
 account amounting to \$1,000.00, there is no doubt that the bank knew
 when it paid the same that the checks were for and that at that time
 it did not know that they were used by Japan for personal purposes.
 As to the Tokyo checks, which were used by Japan and Japan
 were deposited in a small business at that time. Japan is
 charged with the knowledge
 as mentioned points are, the witness testified that
 as to nine of the checks described as "Japan's family and business
 checks," three went to the family group, one to the Tokyo bank
 group's list in payment of loan, one to Japan, one to the
 in payment of Mrs. Japan's account at the store, one to the
 Tokyo's Gas Light and Cold Company for gas supplied to Japan's
 residence, and one to the Commercial Union Company for electric
 service at Japan's home. There could be little doubt that the
 thirty-four checks paid to the Tokyo bank were for, and if
 there should be any doubt there is evidence from which the court
 could find that the checks were for personal purposes of Japan. The
 sixteen checks to Tokyo were paid in cash, and the eight currency
 checks for \$1 each were miscellaneous payments.

There were ten checks to miscellaneous payees, upon which the decree holds defendant liable, which include two \$5 checks of the same kind we have already described. There is one check to the County clerk of Cook county for \$650.72 which was paid by the defendant bank March 18, 1918, and another check to one Aaron Johnson whose identity is not disclosed by the evidence. Six checks were to other banks.

One check for \$191.20 to the Continental and Commercial National Bank, was in payment of a draft drawn on the W. T. Joyner Company, forwarded to the Continental and Commercial National Bank for collection by the First National Bank of Harvey, Illinois.

There were two checks made by Joyner as receiver, concerning which clear and convincing evidence was given, showing that on January 17, 1918, Joyner drew a check as receiver to the order of the First National Bank of Harvey, Illinois, and on October 26, 1918, another check to the order of that bank, each for the sum of \$5,000. It appears that the first of these checks was credited to an account opened by Joyner as receiver with the First National Bank of Harvey, and that in exchange for the second check for \$5,000 the First National Bank of Harvey issued two certificates of deposit for \$2,500 each in the name of Joyner as receiver. The decree finds that the bank is not liable as to these two checks. There was no such proof forthcoming, however, as to the other checks because of the payment of which the decree finds a liability on the defendant bank.

It is contended by the complainant that as to all items subsequent to December 7, 1917, the burden of proof was on the defendant to show that the funds of the receivership held by it as depository were disbursed by Joyner for receivership purposes only. Complainant contends for the proposition that when a bank has been definitely put on notice of the misappropriation of trust funds by

There were two checks for 100,000 yen, which were cashed at the bank of the same kind we have already described. There is one check for 100,000 yen of bank account for 100,000 yen which was paid by the Japanese bank branch in 1935, and another check for one million yen which is not discussed by the witness. The checks were in Japan bank.

One check for 100,000 yen is the Japanese bank commercial National Bank, was in payment of a bank loan on the 1. 1. 1935. Company, founded in the Japanese bank branch in 1935, and the Japanese bank branch in the first Japanese bank in Japan, 1935.

There were two checks made by Japan bank branch, which were cashed at the bank of the same kind we have already described. There is one check for 100,000 yen of bank account for 100,000 yen which was paid by the Japanese bank branch in 1935, and another check for one million yen which is not discussed by the witness. The checks were in Japan bank.

There were two checks made by Japan bank branch, which were cashed at the bank of the same kind we have already described. There is one check for 100,000 yen of bank account for 100,000 yen which was paid by the Japanese bank branch in 1935, and another check for one million yen which is not discussed by the witness. The checks were in Japan bank.

There were two checks made by Japan bank branch, which were cashed at the bank of the same kind we have already described. There is one check for 100,000 yen of bank account for 100,000 yen which was paid by the Japanese bank branch in 1935, and another check for one million yen which is not discussed by the witness. The checks were in Japan bank.

a fiduciary depository and fails to intercede and prevent further misappropriations, it is liable. Bischoff v. Yorkville Bank, 218 N. Y. 106, 112 N. E. 759, L. R. A. 1916 F. 1059, is cited and relied on. The courts of this state have never approved the rule of liability as announced in that case. In the latter case of Whiting v. Hudson Trust Co., 234 N. Y. 394, the New York Court of Appeals, while following the Bischoff case, said that the transactions of banking in a great financial center are not to be clogged or their pace slackened by overburdensome restrictions. This statement was quoted with approval by the Supreme court of the United States in Empire Trust Co. v. Cahan, 47 Sup. Ct. Rep., 661; 374 U. S. 473. That decision reversed the judgment of the Circuit Court of Appeals for the Second Circuit in Cahan v. Empire Trust Co., 9 Fed. Rep. (2nd series) 713.

Without approving the proposition for which complainant contends, a careful consideration of the facts in this record makes it impossible for us to conclude that the finding of the court as to knowledge of the defendant of the misappropriation of this trust fund by Joyner is not sustained by the evidence. The relationship between Miles and Joyner was such (for Miles was in charge of this particular account), the transactions in which misapplication of the funds were made were so many and varied, the disclosures to Miles by Joyner were so clear and frequent, that we think it cannot be held that the defendant acted in good faith in these different transactions, but that as a matter of fact it is charged with knowledge in all those transactions in which it was held liable. It was of course unfortunate for the defendant bank that this account was in charge of Miles, a dishonest official, but that does not relieve it of legal responsibility for his knowledge and actions. Affirmance of the decree is not a reflection on other officials or on the bank itself. Miles represented the bank; his authority

cannot be denied, and his knowledge of and acquiescence in the thefts of Joyner from this trust fund are abundantly proved by the evidence.

Defendant, however, further contends that the allowance of interest upon the amounts converted was improper. We have already considered and passed on that question in Massachusetts Bonding & Ins. Co. v. Community State Bank, 242 Ill. App. 621, and are disposed to adhere to that decision.

Defendant also contends that the court erred in denying its motion for a re-reference of the cause to take the account. Since the accounting had been already taken, the defendant participating therein, we think the motion for a re-reference, after the chancellor had made his findings without disclosing any evidence which in any way could affect the liability as found, came too late. There is no error in this respect.

For the reasons indicated the decree is affirmed.

AFFIRMED.

O'Connor, F. J., and McSurely, J., concur.

GREGORY T. VAN METER, Administrator
of the Estate of HENRY C. ECKART,
Deceased,

Appellee,

vs.

REV. B. J. BONK et al.

SOCIETY OF THE DIVINE WORD, a
Corporation of Illinois,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

MR. PRESIDING JUSTICE MATCHETT

DELIVERED THE OPINION OF THE COURT.

Rev. Henry C. Eckart, a priest of the Roman Catholic Church, died intestate at San Diego, California, on April 16, 1923. At the time of his death he left him surviving as his only heirs at law and next of kin, Ida Eckart, Augusta S. Wolter and Clara M. Brozinsky, his sisters; John E. Eckart and Oscar E. Eckart, his brothers, and Alice C. Stratton, his niece.

Augusta S. Wolter died November 30, 1924, testate, having devised all her estate to her husband. She also left her surviving a son, Marcus Wolter, and a daughter, Dorothy Wolter.

The defendant Society of the Divine Word is an educational, humanitarian and charitable organization organized under the laws of the State of Illinois and affiliated with the Roman Catholic Church. At the time of the transactions involved in this suit, its secretary and treasurer was Rev. B. J. Bonk, who is also named as a defendant.

At the request of some of the heirs and next of kin the complainant was appointed administrator of the estate on January 2, 1924, by the Probate court of Cook county, and he brings this suit in equity to secure an accounting and recover 44 notes of the face value of \$84, 160.

The bill as amended charges that the deceased retained the ownership and control of each of these notes up to the time of his death; that complainant has made demand on the defendant Society to turn over the notes, which it has declined to do, asserting that it has become the owner as trustee and is entitled to the possession of the same. The amended bill prays for an accounting and that the defendants may be required to deliver the notes to the complainant and for general relief.

The answer of the defendants denied that the deceased left any personal property in Illinois at the time of his death and denied that he was the owner of and entitled to the possession of any of the notes, and averred that the deceased during his lifetime voluntarily created certain irrevocable and valid trusts of personal property for religious, charitable, educational and other purposes, and appointed defendant Society trustee in that behalf; that as such trustee the Society received these promissory notes from the deceased.

The answer also asserted that some of these trusts had been completely executed prior to the filing of the bill; that the trustee was no longer in possession or control of such trust property; further that all of the notes were negotiable instruments which were duly assigned, endorsed, transferred and delivered to the defendant Society as trustee by the deceased in his lifetime, and that the legal title vested in the Society.

The cause was before this court on a former appeal, and the decree was reversed for the reason that the real persons in interest had not been made parties thereto. 245 Ill. App. 614. They have now been made defendants to the amended bill, and Ida Eckart, John F. Eckart and Oscar B. Eckart, heirs, filed an appearance and answer admitting the allegations of the second amended bill to be true and joined in the prayer for relief. The institutions

affiliated with the Roman Catholic Church which were made defendants appeared and adopted the answer of the defendants, Monk and the Society of the Divine Word.

The notes which are the subject matter of the suit were by their terms payable to the deceased and are for the principal amounts ranging from \$500 to \$5,000 each. Photographic copies of 30 of the notes and of three receipts which describe the other eight notes are in the record. These eight notes were delivered to relatives of the deceased by the defendant Society, as it claims, in pursuance of the terms of the trusts with reference thereto.

The decree finds that the 23 notes, which are numbered as Exhibits Nos. 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51 and 52, should be accounted for and delivered to the complainant, together with payments received thereon. These notes are for the aggregate amount of \$40,860. The decree also finds that the defendant Society is the legal owner and holder of 13 of the notes which are numbered as Complainant's Exhibits Nos. 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51 and 52; that the Society holds these as trustee for the use and benefit of the beneficiaries named in the respective endorsements appearing on the notes or in certain letters in evidence written by the deceased. These notes aggregate the principal sum of \$28,600.

As to the other notes, eight in number, the decree finds that they had been delivered by the Society to the beneficiaries, Mrs. Eva Schoenig, Mrs. Clara Bresinsky and Mrs. Augusta Walter, before the filing of the original bill of complaint; that thereby the trusts became fully executed and the notes, the property of the respective beneficiaries.

Judgment was entered according to these findings and the cause referred to a master to state the account.

attained with the Roman Catholic Church which were made before
suggested and might be the answer of the Government, and the
of the Divine Word.

[illegible]

The above items are 23 notes, which are numbered as follows: 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852

As to the other cases, eight in number, the decision of the court was that they had been delivered by the Society to the beneficiaries, and that the Society was not liable for the same.

The same was observed in a number of other cases.

The Society of the Divine Word assigns as errors these findings of the decree which declare the alleged trusts invalid, and asks the reversal of these parts of the decree.

The administrator has assigned cross-errors and asks that the finding that the alleged trusts were invalid be affirmed and that, insofar as the decree found any of the alleged trusts to be valid, the same be reversed.

There is practically no dispute as to the facts. The defendant Society has its principal offices at Teahay, Cook County, Illinois. Its English is a translation of its Latin name, "Societas Verbi Divini." It is also known as "S.V.D.", "Fathers of Teahay" and "Teahay." It has been in existence for 27 years. Its secretary did not know the deceased personally, and the transactions in regard to these notes were carried on through correspondence and for the greater part in German, which was the native language of the deceased.

The notes appear to be the obligation of various societies and institutions affiliated with the Roman Catholic Church. With the single exception they are made payable to the order of "Rev. H. O. Eckert, Agt." The notes and correspondence were produced by defendant upon notice given by the administrator and offered in evidence by him. With exceptions hereafter noted, these notes are endorsed by the payee and seem to have been sent by him through the mails, he writing from San Diego, California, while he was in St. Joseph's Hospital at that place. The correspondence began with a letter by the deceased, dated November 10, 1921, and ended with a letter from the Society dated April 7, 1923.

Seven of the notes were received by the Society from the deceased with a letter dated December 13, 1922. Five of these notes appear as Exhibits 20 to 24, inclusive, and are for the sums of \$2500, \$1300, \$500, \$300 and \$500, respectively. After describ-

[illegible]

ing these five notes the letter states:

"As it is written to be paid to Europe thirty days after my death. Just the way the notes will become due. Should these notes become due and be paid then Techny, Ill. S. V. D. has the full right to borrow this money at 5% interest until my death comes, but interests are to be sent to me directly. I, however, reserve all rights to change this before my death."

Exhibit 20 is endorsed:

"Pay to the order of Techny, Ill. for Europe Braunweiler Post Roxheim E. Krennsacht Rheinprovinz, Germany for a new Catholic Church."

But the endorsement of this note for \$2500 is not signed. The note Exhibit 21 has this endorsement:

"In case of my death pay to the Society of Divine Word, (Techny, Ill.) for Europe Braunweiler Post Roxheim Rheinprovinz, Germany, for a new Catholic Church. (Dec. 8-22.)
H. G. Eckart, Agt."

Exhibit 22 is endorsed:

"Pay to the order of S. V. D. Techny, Ill., for Europe (Braunweiler Post Roxheim E. Krennsacht, Rheinprovinz, Germany) for a new Catholic church Dec. 8-22. Rev. H. G. Eckart, Agt., San Diego, Calif."

Exhibit 23 is endorsed:

"Pay to the order of Techny, Ill. for Europe Braunweiler Post Roxheim E. Krennsacht, Rheinprovinz, Germany, for a new Catholic Church. Dec. 8-22. Rev. H. G. Eckart, Agt."

Exhibit 24 is endorsed:

"Pay to the order of S. V. D. Techny, Ill., for Europe Braunweiler Post Roxheim E. Krennsacht Rheinprovinz Germany for a new Catholic Church. Dec. 8-22. Rev. H. G. Eckart, Agt."

These five notes all bear other prior endorsements which appear, however, to have been cancelled.

After a description of the two other notes, one for \$800 and one for \$400, the letter contains this statement:

"To be paid as written to Eva Schoenig, now living at No. 244 Union St. Jersey City, N. J. She is a cousin of mine and has a sick son (crip led); she is sister in law of Reverend Schoenig. S. V. D. Mrs. Walter, 3202 Chestnut Street, Milwaukee, Wisc., is my sister and she can later on give you the address of Eva Schoenig."

"This is all for today."

Each of the other two notes which are described in

Exhibit 25 bears this endorsement:

1943/44 24th Sept 1944 24th Oct 1944 1945

[illegible]

COMMITTEE ON THE FUTURE OF THE U.S. SUPREME COURT

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28 November 1944 and 18 December 1944 and 1945

1. The first of these is the fact that the
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TOP SECRET

1. Background and context		2. Objectives		3. Methods		4. Results		5. Conclusions	
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1.2	1.2.1	1.2.2	1.2.3	1.2.4	1.2.5	1.2.6	1.2.7	1.2.8	1.2.9
1.3	1.3.1	1.3.2	1.3.3	1.3.4	1.3.5	1.3.6	1.3.7	1.3.8	1.3.9
1.4	1.4.1	1.4.2	1.4.3	1.4.4	1.4.5	1.4.6	1.4.7	1.4.8	1.4.9
1.5	1.5.1	1.5.2	1.5.3	1.5.4	1.5.5	1.5.6	1.5.7	1.5.8	1.5.9
1.6	1.6.1	1.6.2	1.6.3	1.6.4	1.6.5	1.6.6	1.6.7	1.6.8	1.6.9
1.7	1.7.1	1.7.2	1.7.3	1.7.4	1.7.5	1.7.6	1.7.7	1.7.8	1.7.9
1.8	1.8.1	1.8.2	1.8.3	1.8.4	1.8.5	1.8.6	1.8.7	1.8.8	1.8.9
1.9	1.9.1	1.9.2	1.9.3	1.9.4	1.9.5	1.9.6	1.9.7	1.9.8	1.9.9
1.10	1.10.1	1.10.2	1.10.3	1.10.4	1.10.5	1.10.6	1.10.7	1.10.8	1.10.9
1.11	1.11.1	1.11.2	1.11.3	1.11.4	1.11.5	1.11.6	1.11.7	1.11.8	1.11.9
1.12	1.12.1	1.12.2	1.12.3	1.12.4	1.12.5	1.12.6	1.12.7	1.12.8	1.12.9
1.13	1.13.1	1.13.2	1.13.3	1.13.4	1.13.5	1.13.6	1.13.7	1.13.8	1.13.9
1.14	1.14.1	1.14.2	1.14.3	1.14.4	1.14.5	1.14.6	1.14.7	1.14.8	1.14.9
1.15	1.15.1	1.15.2	1.15.3	1.15.4	1.15.5	1.15.6	1.15.7	1.15.8	1.15.9
1.16	1.16.1	1.16.2	1.16.3	1.16.4	1.16.5	1.16.6	1.16.7	1.16.8	1.16.9
1.17	1.17.1	1.17.2	1.17.3	1.17.4	1.17.5	1.17.6	1.17.7	1.17.8	1.17.9
1.18	1.18.1	1.18.2	1.18.3	1.18.4	1.18.5	1.18.6	1.18.7	1.18.8	1.18.9
1.19	1.19.1	1.19.2	1.19.3	1.19.4	1.19.5	1.19.6	1.19.7	1.19.8	1.19.9
1.20	1.20.1	1.20.2	1.20.3	1.20.4	1.20.5	1.20.6	1.20.7	1.20.8	1.20.9
1.21	1.21.1	1.21.2	1.21.3	1.21.4	1.21.5	1.21.6	1.21.7	1.21.8	1.21.9
1.22	1.22.1	1.22.2	1.22.3	1.22.4	1.22.5	1.22.6	1.22.7	1.22.8	1.22.9
1.23	1.23.1	1.23.2	1.23.3	1.23.4	1.23.5	1.23.6	1.23.7	1.23.8	1.23.9
1.24	1.24.1	1.24.2	1.24.3	1.24.4	1.24.5	1.24.6	1.24.7	1.24.8	1.24.9
1.25	1.25.1	1.25.2	1.25.3	1.25.4	1.25.5	1.25.6	1.25.7	1.25.8	1.25.9
1.26	1.26.1	1.26.2	1.26.3	1.26.4	1.26.5	1.26.6	1.26.7	1.26.8	1.26.9
1.27	1.27.1	1.27.2	1.27.3	1.27.4	1.27.5	1.27.6	1.27.7	1.27.8	1.27.9
1.28	1.28.1	1.28.2	1.28.3	1.28.4	1.28.5	1.28.6	1.28.7	1.28.8	1.28.9
1.29	1.29.1	1.29.2	1.29.3	1.29.4	1.29.5	1.29.6	1.29.7	1.29.8	1.29.9
1.30	1.30.1	1.30.2	1.30.3	1.30.4	1.30.5	1.30.6	1.30.7	1.30.8	1.30.9
1.31	1.31.1	1.31.2	1.31.3	1.31.4	1.31.5	1.31.6	1.31.7	1.31.8	1.31.9
1.32	1.32.1	1.32.2	1.32.3	1.32.4	1.32.5	1.32.6	1.32.7	1.32.8	1.32.9
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These five men

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After a few days, the water level was found to be about 10 cm higher than the level of the surrounding water.

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"Pay to the order of S. V. D. at Teshny Illinois to Mrs. Eva Schoenig Jersey City N. J. sixty days after my death. Dec. 8 1922. Rev. H. C. Eckart Agt."

The evidence also tends to show that six notes which were marked as Exhibits 28 to 31, inclusive, were received by the defendant Society with a writing which appears in the record as Complainant's Exhibit 12. The writing describes these notes and states further:

"I entrust to S. V. D. the following notes for my nephews or nieces children of my 2 brothers John P. Eckart and Oscar Bernard Eckart, who are not Catholics. The above J. P. and Osc. B. were only baptized Catholics-- but never instructed in the Catholic Church (religion.) Up to date J. P. B. has only four daughters. His 4 boys died. The girls are Olga, Una, Agnes, Ila. Oscar B. E. has 2 daughters living.

Alice my brother's, Herman Eckart, daughter is married, and the only child of Herman E. She my niece by marriage. Now I entrust to S. V. D. these notes:--"

This sum of \$7000 is to be divided equal shares i. e. \$1000 each child receive \$1000 whenever such child gives written proof from any Catholic parish priest in writing of having studied and joined the Catholic Church after one (1) years time, having joined the Catholic Church and is 21 years old and 6 months after my death. All such, who did not study and join the Catholic Church forfeit their claim on the \$1000 and each part \$1000 goes to the heathen missions of the S.V.D. under their charge. The respective interest accruing on these entrusted notes is to be paid me during my natural life and afterwards (after my death) the interest is to be added to the respective capital of each note till paid each converted niece or nephew of these poor children being neglected religiously. S. V. D. is to inquire about these nieces or nephews and inform them, each one individually regarding deposited sum and conditions to receive their bequest from Rev. Uncle Henry, as I am known by these. John P. Eckart and Oscar B. Eckart are at this time living in Cullenberg, Clayton County, Iowa. They most likely will remain there for life. They are bankers (C. State Bank). These can give address of my niece Alice nee Eckart.

Should none or only some nieces or nephews join then only such \$1000 respectively is to be paid and the balance of the \$7000 goes after 2 years after each niece or nephew has attained the age of 21 not having become Catholic this money forfeited goes to the heathen missions under charge of S.V.D. Such is my intention and will.

Signed by me in presence of my God and Judge.

Rev. H. C. Eckart,
San Diego, Cal."

"My two natural sisters Mrs. Wolter, Mrs. Clara M. Brezinsky can give information about these nieces or nephews.

Mrs. Wolter, 3203 Chestnut Str. Milwaukee, Wis.

Mrs. Brezinsky lives now at 1115 So. State Ave. Freeport, Illinois. These are good Catholics, my first convert after ordination (1888)."

The writing then describes three other notes for \$1000 each and says that these notes --

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2. second of these is the fact that the
3. third of these is the fact that the
4. fourth of these is the fact that the
5. fifth of these is the fact that the
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7. seventh of these is the fact that the
8. eighth of these is the fact that the
9. ninth of these is the fact that the
10. tenth of these is the fact that the

1. The evidence also tends to show that the above-mentioned persons were not in the vicinity of the scene of the crime at the time of the same.

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was not. It was consequently in an effort to get the
truth out of the man who had been in the
line of duty at the time of the explosion, the
fact that the man had been in the line of duty
at the time of the explosion was not in question.

[illegible]

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— 100 —

"are entrusted to S. V. D. for my Catholic nephew and nieces i. e. Serenus H. Welter, son of my sister Augusta Welter, and Dorothy Welter, sister to Serenus H. each is to have \$1000 6 months after my death and 21 years old each child. Marie D. Brasinsky, daughter of Mrs. Clara M. Brasinsky is to have \$1000 when 21 years old and 6 months after my death. I am to have the annual interest paid me till death or otherwise diverted by me in writing. After my death the accruing interest on each \$1000 is to form a part of the capital with \$1 till paid each respective heir. The S.V.D. is to have all these loans at 6% till paid out on above conditions. This is my will signed in presence of my God, Creator and my Judge. Dec. 8, 1922.
 Rev. H. C. Eckart,
 San Diego, California."

The endorsements upon the notes appearing as Exhibits Nos. 26, 27 and 28 are substantially as follows:

"Pay to the order of S.V.D. at Techny, Ill., for Eckart heirs, in trust. Dec. 8/22 Rev. H. C. Eckart, Agt. San Diego, Cal."

Upon the note marked as Exhibit 29 appears this endorsement:

"Pay to the order of S. V. D. at Techny, Ill. in trust for Eckarts' Heirs; Serenus H. Welter \$1000 & Dorothy Welter \$1000; according to conditions laid to S.V.D. Revd. H.C.Eckart, Agt. Dec. 8/22 San Diego, Calif."

The note marked as Exhibit 30 is endorsed:

"Pay to the order of S.V.D. at Techny, Ill. in trust for Eckart Heirs Serenus H. Welter & Dorothy Welter in equal shares as conditions laid down with S.V.D. Techny, Ill. Dec. 8/22. H. C. Eckart, Agt. San Diego, Calif."

No. 31 is endorsed:

"Pay to the order of S.V.D. at Techny, Ill. in trust for Eckarts heirs. Marie D. Brasinsky as conditions laid down with S. V. D. (Rev.) H. C. Eckart, Agt. San Diego, Calif. Dec.8/22."

This note is stamped cancelled, September 17, 1924.

In a letter written in December, 1922, the precise date being omitted, the deceased transmitted to the defendant Society five notes for the aggregate sum of \$20,500, which appear in the record as Exhibits 33 to 37, inclusive. In the letter he said:

"Herewith I send you some notes transferred to the S.V.D. to be deposited with the S.V.D. for the following purposes:****

This sum Twenty Thousand is to create 4 student burses for heathen mission work after my death only. I am to have this annual interest sent me directly during my life, unless I

otherwise direct in writing to your House.

1 burse in h. of Divine Heart of Jesus.

1 burse in h. of Immaculate Heart of Mary.

1 burse in h. of St. Henry my patron Saint.

1 burse for the Poor Souls in general and specially for all Eckarts deceased (Poor Souls.)

The \$500 is to be given directly to Holy Father the Pope then in Rome for the most needy nation's poor people then preferable to the Germans."

In this letter three other notes, one for \$4000, one for \$3500 and one for \$500 are mentioned, and the writer states:

"III. I note \$4000; date Mary 1st 1920 due 1927/6% signed over to my dear natural sister, Mrs. Augusta Walter nee Eckart. The society D. W. is entrusted this note to give in full the above heir 10 days after my death. If this note falls due before my demise I will give in full right this whole sum \$4000 as a loan till my natural death at 6% interest payable to me till death of mine, unless otherwise directed by me.

IV. 1 note \$3500; dated March 1st 1919 due 1928/6%. This note is signed over to my dear natural sister, Mrs. Clara M. Brezinsky nee Eckart same conditions as above.

(III) in trust held by S.V.D. till my death.

V. 1 note \$500; date Nov. 12/1920 due 1927/6% signed over to Mrs. Clara M. Brezinsky my natural sister all conditions as in (III) in trust held by S.V.D. till my death.

Gedieil should these sisters above die before me, their children fall heirs to their mothers. This respective sum is money in their (sisters) own right and not to be community property of their respective husbands. Only when each respective child reaches the age of 21 years they are to have their proportioned share paid out in full by S.V.D. The respective annual interest is to be paid regularly by S.V.D. to each child till it reaches 21 years then pay in full. The S.V.D. is to have all such money as a loan after these respective notes mature and are paid in full by the original makers of such notes. This day feast of the Immaculate Conception D. W. M. I sign my respective name to this in the divine presence of God my Creator and Judge.

Rev. H. C. Eckart."

Exhibit No. 33, being a note for \$2700, No. 34 being a note for \$4500, No. 35 being a note for \$3800 and No. 37 being a note for \$4000, are in evidence and are each endorsed substantially as follows:

"Pay to the order of S. V. D. at Tachny, Ill. Rev. H.C. Eckart Agt. Dec. 8/22 San Diego, Calif."

Exhibit No. 36, being a note for \$3500, is as follows:

"Pay to the order Rev. H. C. Eckart, Agt. Dec. 8/22, San Diego, Calif."

Complainant's Exhibit No. 38, which is a receipt of Augusta Walter, describes a note for \$4,000, dated March 1, 1920,

payable to the order of Rev. H. C. Eckart and is endorsed as follows:

"Pay to Mrs. F. X. Wolter in her own right after my death 5/1st, 1920. Rev. H. C. Eckart, Agt. in trust with S.V.D., Techny, Ill. until my death. Rev. H. C. Eckart, Agt. Dec. 9/22."

Another note for \$1500, payable to the order of the deceased is described in this receipt and bears the following endorsement:

"In case of my death pay to Mrs. Augusta Wolter in her own right. By S. V. D. Techny, Ill. 2/28/23. Rev. H. C. Eckart, Agt. Pay the annual interest till note is due to Mrs. A. W. after my death."

Said receipt also describes a note for \$1500 to the order of Father Eckart, which bears the following endorsement:

"In cases of my death pay to Mrs. Augusta Wolter, Rev. H. C. Eckart Agt. 12/30/21. Mrs. Augusta Wolter is to pay to the Benedictine Sisters in Duluth, Minn. Villa St. Scholastica \$500 out of this note. These sisters are to record me as their benefactor of their order. by S. V. D. at Techny, Ill."

The receipt of Clara M. Berezinsky appears in the record as Complainant's Exhibit 39 and describes a note dated November 12, 1920, for \$500 to the order of Rev. H.C.Eckart, Agt., and bears the following endorsement:

"Pay to the order of Mrs. Clara Berezinsky in her own right after my death. In trust with S.V.D. at Techny, Ill., Dec. 8-22";

also a note dated March 1, 1921, for \$2500, containing thereon the following endorsement:

"In case of my death pay to the Society of the Divine Word, Techny, Ill., in trust. Feb. 26th, 1923. Rev. H.C.Eckart, Agt.

"Pay this note to Mrs. Clara M. Berezinsky in her own right. She is my natural sister as also Mrs. Augusta Wolter; inquires from her the Milwaukee, Wis., home of Mrs. Clara M. B. No. 3203 Chestnut St.

"Pay the annual interest till note is due to Mrs. C.M.B. after my death. Rev. H. C. E.";

also a note dated March 1, 1919, for \$3500 to the order of Rev. H. C. Eckart, Agt., which bears the following endorsement:

"Pay to Mrs. Clara M. Berezinsky in her own right after my death. Rev. H.C.Eckart. In trust with S.V.D. at Techny, Ill. till my death. Rev. H. C. Eckart, San Diego, Cal. Dec. 8/22. S. B. I wish the above assignment to Mrs. Clara M. Berezinsky stand. See on top of note. Rev. H. C. Eckart, Dec. 8/22, San Diego, Calif."

A burse is an allowance for the subsistence of a student

to aid him in procuring an education. The record also discloses seven notes which are marked as Exhibits 53 and 55 to 60, inclusive. The record fails to disclose that these notes were accompanied by letters. Exhibit 53 is a note for \$1,000, upon which appears the following endorsement:

"In case of my death pay to Sisters of Mercy in San Diego, Calif. \$500. 12/30/21. The other \$500 pay to Miss Ida Eckart, Guttentberg, Iowa. Rev. H. C. Eckart, Agt.

The Sisters of Mercy--San Diego, Calif. have recorded me Rev. H.C.E. as a benefactor of their order. Rev. H.C.E. 12/30/21.

Pay to S.V.D., Techmy, Ill.--trust for the above."

Exhibit 54 is a note for \$1,000, which bears the following endorsement:

"In case of my death pay to S.V.D. at Techmy, Ill., the Society of the Divine Word in Trust. July 21/22 Rev. H.C. Eckart Agt. Towards a colored student bursar."

The note is stamped "Cancelled, November 5, 1923."

Exhibit 55 is a note for \$1,000 bearing the following endorsement:

"Pay to S.V.D. at Techmy, Ill. in trust. In case of my death pay this $\frac{1}{2}$ \$500 note to the House of Good Shepherd in Spokane, Wash. in full as per request by me. Rev. H. C. Eckart, Agt. July 25/22.

The other $\frac{1}{2}$ \$500 to S.V.D. at Techmy for holy masses in Mother House at Techmy, Ill. for my poor soul. Rev. H.C.E."

Exhibit 56 is a note for \$500 which bears the following endorsement:

"Pay to the order of S.V.D. at Techmy, Ill. After my death, in trust for the Holy Land. Pay to Commissariat, Mt. Saint Sepulchre, Washington D. C. Rev. H.C.Eckart, San Diego, Calif. Dec. 3/22."

This note is stamped "Cancelled July 3, 1924."

Exhibit 57 is a note for \$2000 endorsed as follows:

"Pay to the order of S.V.D. Techmy, Ill. in trust, they pay the O.S.B. Yankton \$1000 as benefactor gift. \$500 for holy masses to be said or sung in their chapel soon after my death. \$500 for holy masses to be said or sung by O.S.B. Fathers in Conception, Mo. Rev. H.C.Eckart March 21/23 San Diego, Calif."

Complainant's Exhibit 58 is a note for \$500 which bears the following endorsement:

"In case of my death pay to the Carmelite Sisters D.C.J. at San Antonio, Texas San Sabn St. No. 503 7/25/22 Rev. H.C. Eckart Agt.

"Pay to S.V.D. Techmy, Ill. in trust for the above."

Exhibit 59 is a note for \$1,000, bearing this endorsement:

"In case of my death pay to the Society of Divine Word at Techmy, Ill., for holy masses of Rev. H. C. Eckart read these H. masses quam plurimum by S.V.D. patres. Rev. H. C. Eckart 12/30/21."

The note is stamped "Cancelled April 19, 1923."
a note

Exhibit 60 is for \$1100, bearing the following endorsement:

"In case of my death pay to the Society of Divine Word, Techmy, Ill. for holy Mass of Eckarts family deceased. Rev. H. C. Eckart 12/30/21"

This note is also stamped "Cancelled April 19, 1923."

With reference to the notes marked as Complainant's Exhibits 41 to 60 inclusive, Father Donk stated that the notes were received between November 19, 1922, and March 31 or April 2, 1923, and at different times. He was not able to pick out any notes which were received at a particular time and identify them. He said he could pick out only those mentioned specifically in the letters.

O. S. B. means the Order of Saint Benedict.

On February 27, 1923, the deceased wrote to the defendant Society:

"Reverend Father:

Enclosed find a few more notes of mine that ought to be entrusted to your house. See that all are copied accurately; some have not destination yet so they are given to you in trust only. Kindly mark this on your copy to enable me to give you the proper destination later on. I am not well today so I would like to get rid of this. As requested before kindly have those that have the notes send the interest directly to me. Later on I might change this.

Now you are requested kindly let me know soon whether I can have a grave in your place in case I desire it. Here amongst strangers I do not like it so well, and I will have more prayers there, the location would be more centrally for my relatives. I wish to have only a small tombstone and the same as you have them in your cemetery. I do not like that any exception should be made. I leave that much money. Now I am about through only a few small notes and the annual interest that I have coming. Kindly let me know at once if you receive this letter, even if it is a few lines, that I know the letter reaches you. Later on you can let me have the copies of the notes. With regards
(Sgd.) Rev. H.C.Eckart.

Kindly send me only a few lines, whether you have re-

May 20, 1944, New York, N.Y. in New York City.

Enclosed is a copy of the letter, dated May 19, 1944.

The letter is dated May 19, 1944, and is addressed to you. It is a copy of the letter, dated May 19, 1944, and is addressed to you. It is a copy of the letter, dated May 19, 1944, and is addressed to you.

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Very truly yours,

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Enclosed is a copy of the letter, dated May 19, 1944.

ceived my letter. Later on in about two or three weeks send me a copy of all papers to me, but not until I write again. I am not well today.

In case I should die before please take all notes as noted on the reverse side, and see what is written there. Take one free scholarship for American Negroes, or if sufficient two free scholarships, one for white free scholarship in the Orient, and all the rest of the money for the finishing of the large church that is now in the state of erection. I have something else coming from St. Louis, Missouri. This is to Techay. Just pray for me."

On March 5, 1923, the Society of the Divine Word wrote Father Eckart at San Diego, California:

"A short letter in haste before closing of the mails. Just received your letter--read it, and counted the notes. If no error was made in hastily counting them, there were 17 notes amounting to \$32,560.00. Yes, surely, we shall send you a copy of these notes, just as soon as we possibly can.

Regarding the other matter, i. e. grave and a small monument, we just now were so fortunate to meet Father Rector--why to be sure, he said, we shall gladly attend to this; hence, you may consider this matter settled."

On March 31st deceased wrote to defendants this letter indicating that he knew the end was very near:

"All notes not assigned to any purpose go first to a negro burse \$5,000, the rest to other heathen burse. Of course pay all expenses. I may leave for cockpit here. If I have not plenty in the bank here you settle this from first cash interest income. Demand bill or receipt always. One lay man will accompany my remains to Techay, a Mr. John Schwenk.

Should I not have full cash to his expenses he will advance same for me. You ask the account from him and pay him full with \$50 extra bonus, for time lost. If he would not accept then tell to have \$25 masses said for me.*** Upon my death to you notify 10 days later all my debtors so they know where to pay their notes and get their bequests from me also as credits in their note. I request a solemn requiem from S. V. D. Father. The stip. is to be \$50 all included, choir, etc. If any visitors, priests I knew, wish to take part let them do so, no remuneration for their services, all gratis date. Even if my bishop would volunteer, accept the services, no pay. If any my relatives should come treat generously and take \$5 per capita as pay for same.****

Make notice of same in your books. That makes 3 bursees fully established and paid in to your house up to date April/23. I may give you another big surprise around May 15/23.

How far is the Holy Ghost Church finished? Do you intend to finish same in 1925 with near enough means on hand.****"

On April 7, 1923, the Society wrote Father Eckart at San Diego, California:

"In haste we wish to inform you herewith briefly, that we have just received your registered letter of April 3, containing note No. 107 of the Benedictine Convent of the Sacred Heart,

Yankton, N. Dak. for \$1,000.00.

Sincerest thanks, and may God reward you. We hope that Brother can let you have a copy of the list of the last notes during the course of next week."

Two days prior to this time, on April 5, 1923, the Society wrote Father Sekart at San Diego, stating that in reply to his letters of March 22 and 31, they were glad to inform him that they had succeeded in finding the looked for note; that it was among those sent a month ago that day; that it was included in the \$32,560 acknowledged by the Society on March 5. They further said:

"We also note your request to have \$5,000.00 applied for a Negro nurse and the rest for other heathen nurses. Also your request concerning Mr. Schwank and other instructions as to the funeral. Right here we wish to say that we hope and pray that God may spare you and restore your health.

We shall also follow your instructions concerning the two contracts held by your sister, Mrs. F. M. Wolter, one for herself and one for Mrs. Bresinsky. Yes, including these you will have completed three Nurses."***

There is no question under the evidence as to what the intention of the deceased was with reference to the disposition of his property. There is no claim of fraud or undue influence. If his intention is to fail, it must be because that in some essential matter he misapprehended or failed to comply with the rules of law by which such disposition of property could be made. It is not at all easy (as an examination of the authorities discloses) to distinguish between a disposition of property by trust and a disposition of the same by will. There is, of course, the distinction to begin with, that a will is brought into existence by reason of compliance with special provisions of the statute and that it always assumes to dispose of property in futuro, while a trust usually acts in present. In Page on Wills, 2nd ed., vol. 1, sec. 68, p. 115, the author says:

"Trusts and wills are especially likely to be confused, since they are frequently used to accomplish the same purpose; that is, to provide a plan for administering and distributing the estate of the former owner after his death; and the intention of the former owner is frequently directed to the results which he wishes to accomplish rather than the means by which he wishes to accomplish it.

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"If the instrument takes effect and passes an interest before the death of the donor, it is a trust as distinguished from a will, although enjoyment of the property is not to pass until after the death of the donor, as where the instrument which creates the trust provides for the support of the grantor during his life, or reserves power to change the beneficiaries.

"A provision that the trust shall terminate upon the donor's death and that the fund shall be paid to a certain designated person, or a declaration by one who holds the legal title that he holds it to protect the interest of another, to whom he will give a deed later, or the act of a wife in paying the property to trustees under her husband's will, creates a trust; and it is not testamentary.

"If the instrument passes no interest until the death of the donor, it is a will as distinguished from a trust.

"A deposit by the depositor as trustee, and payable on his death to a certain designated person, or a provision that in case of accident, a certain person is to take charge of the donor's estate to dispose of as he sees fit after debts are paid, or a transfer by A of certain bonds in trust, the income to be paid to A for life and then to X and Y, A reserving a power of revocation, amounts to a will and not to a trust.

"If the trust reserves to the settlor full power to dispose of the principal and its only present effect is to grant whatever, if anything, may be left at the settlor's death, the instrument is, in effect, a will."

In Giney v. Hove, 89 Ill. 586, a citation from the County court issued to an administratrix to show cause why she had not filed an inventory. She filed an answer claiming the property, which consisted of a note and other personal goods, as her own individual property. This claim was based on a written instrument made between the administratrix and the deceased prior to her death, whereby the administratrix agreed to furnish the deceased with a home and support during the term of her natural life, in consideration of which the deceased (as the writing stated) sold, assigned and transferred to the administratrix all her properties and effects, consisting of household goods, notes and other securities, "possession of the same to be given^{to} and taken by the party of the second part immediately upon the decease of the party of the first part." The writing also provided that the deceased should have the interest on the notes during her lifetime and that after her decease the party of the first part should pay \$300 to a son of the deceased. The Supreme Court said that the instrument contained no declaration of trust; that it did not appear therefrom that it

was the intention of Mrs. Bogart to assume the position of trustee and thereafter hold the property in trust, as gestui ons trust; that the writing was essentially testamentary in its nature; that its object was to make disposition of property after the death of the owner, and that it could not have such effect because it had not been executed and witnessed as required by the statute of wills. The court further held, reviewing authorities, that the alleged contract was void for want of actuality and that under the Married Woman's Act, Mrs. Olney, who was then married and living with her husband, could not bind herself with a contract of that kind.

In Trubey v. Pease, 240 Ill. 513, an administrator to collect, who was the husband of a deceased wife, filed a petition for an order requiring Pease to turn over to the estate certain personal property consisting of notes, securities and other chattel property. The Probate court held that the property was assets of the estate, and upon appeal to the Circuit court it was held to the contrary upon the theory that the deceased in her lifetime had made valid gifts of the property which were fully executed by delivering the same. It appeared that the deceased made a will giving certain legacies to two sisters and two brothers and to her husband the interest to which he might be entitled under the statute subject to a loan which the wife had made to him, and the remainder of her property to a niece. The respondent to the petition, Pease, was an attorney-at-law who had acted in that relation to Mrs. Trubey for some years. He testified that the deceased asked him at the time of making the will if she could make a valid bequest of her personal property to Jettie Richardson and that he advised her that she could not; that she said she must arrange it in some other way. Later the deceased sent for the attorney to come to her house and when ^{he} arrived requested him to go to her safety deposit box and get her securities, jewelry, etc., which he did; that she then separated

the articles into different parcels and told him to whom she wanted them to go; that he marked the parcels with the name and address of the party to whom the different articles were to be given on slips of paper and put them with the parcels; that the deceased fixed no time at which they were to be given to the parties; that she stated it was her intention to educate the children of Jettie Richardson if she lived, but that she believed that she was in her last illness and wanted to make sure that the property was delivered to Jettie Richardson so that she could use it to educate her children. Pease gave a receipt to Mrs. Trubey for the property, which concluded: "All of the above described articles to be given to parties mentioned in memoranda contained in envelope holding securities," and this receipt was found pinned to the will when it was opened in the Probate court after Mrs. Trubey's death. At the time the receipt was given the attorney asked Mrs. Trubey if she realized what she was doing -- that she had given these things away and they were going out of her possession, and she said, "Yes, I know what I have done, and I am glad to have it off my mind, for I am liable to wink out any minute, and I will write Jettie Richardson and tell her what I have done and you will hear from her." The attorney then took the property and rented a box in which he placed it, with the exception of the silverware which was placed in his private vaults in his office. Before Mrs. Trubey delivered the securities she tore off some interest coupons and asked Pease to collect them and send her the money, which he did.

On this state of facts the court said there could be no doubt that Mrs. Trubey desired the persons designated by her to have the property, but held that it was very clear that if the attorney was the agent of Mrs. Trubey to deliver the property to the donees, the agency was revoked by her death before the delivery was made and no title therefore passed to the donees. However, it was

the parties into different parties and told him to whom the money
 was to be paid; that he mentioned the names with the name and address of
 the party to whom the different parties were to be given on a list
 of paper and put them with the parties; that the document filed in
 that to which they were to be given to the parties; that the original
 of the parties was in the possession of the parties at the time
 it was filed, but that she believed that she was in her last ill-
 ness and wanted to make sure that the property was delivered to
 the parties and that she could see it to ensure that it was
 there was a receipt to her. That the parties, which were
 given: "All of the above described parties to be given to her
 the amount of money mentioned in the parties and the parties
 list," and the parties and the parties to her will were
 given to the parties after Mrs. Tinsley's death. At the time
 the receipt was given the parties asked Mrs. Tinsley if she realized
 what she was doing -- that she had given these things away and that
 were going out of her possession, and she said, "Yes, I have them
 here now, and I am glad to have it out of my mind, for I am unable to
 write any more, and I will write the parties and the parties
 her name I have them and you will have them too." The parties then
 took the parties and put a box in which he placed it, with the
 attention of the parties which was placed in his private vault
 in his office. Before Mrs. Tinsley delivered the parties she told
 all some interest persons and asked them to collect them and send
 her the money, which she did.

On this date of the parties the money was given to
 the parties Mrs. Tinsley delivered the money designated by her to
 the parties, but Mrs. Tinsley said it was very clear that it was the
 money and the agent of Mrs. Tinsley to deliver the property to the
 parties, the money was received by her agent before the delivery was
 made and no other parties passed to the parties. However, it was

contended that the attorney was made the trustee for the donees, and it was urged that the delivery to the trustee was equivalent to delivery to them and had the effect of vesting title in them. The court said that the law was well settled that delivery to a trustee was deemed delivery to the donee and would divest the donor of all control over or right or title in the property and make the gift irrevocable; that when a trust had been perfectly created it was not revocable by the death nor at the will of the party who created it, citing Taylor v. Harmines, 179 Ill. 137; Telford v. Patton, 144 Ill. 411; Light v. Scott, 98 Ill. 239; Lawrence v. Lawrence, 181 Ill. 248. The court further said that it was incumbent on the party asserting the trust to prove it by clear and satisfactory evidence; that whether a trust existed was to be determined from the proof, having in view all the surrounding facts and circumstances and the intention of the parties, and that the proof must be clear and explicit; that the words and acts relied on as creating the trust must show clearly and unequivocally the intention of the donor to create a trust; that apart from the requirements of the statute, no particular form was essential to the creation of a trust, but that the acts or words relied on must be unequivocal, admitting of but one interpretation and manifesting a completed transaction in praesenti. The court also said that it was impossible to escape the conviction that Mrs. Trubey made her attorney her agent to deliver the property and not a trustee for the donees; that when she gave him the property she had in mind notifying them of what she had done so that they might receive it from him; that if she had carried out that intention, there would have been a delivery to the donees before the death of the donor and the title to the property would then have vested in the donees, but that for some reason she delayed carrying out this intention during her lifetime and the death revoked the agency. Expressing

regret that the effect of this ruling was to prevent the carrying out of the intention of Mrs. Trubay, the court said that however clear her intention might have been, it could not prevail unless she did such acts as the law required to make that intention effective; that a court of law would not impute an intention to create a trust where a trust was not in contemplation; that if the transaction was intended to be effected by a gift and the gift was incomplete for want of delivery, it could not be enforced as a declaration of trust for the reason that to do so would be to substitute in place of the actual intention to transfer the property directly to the donee the intention to make or become a trustee, and would open the way for every imperfect gift to be converted into a perfect trust.

In Wilson v. Wilson, 155 Ill. 567, William Wilson and others filed their bill against Samuel Wilson and others to set aside a deed and for partition. It appeared that on September 2, 1889, their common ancestor, Col. Wilson, was the owner of a farm in McDonough County and made and acknowledged a deed purporting to be an absolute and unconditional conveyance of this land to the defendants; that shortly thereafter he handed the same to one of them, his daughter, and said deed remained in her possession thereafter. It was not recorded until the day following the death of the grantor. A preponderance of the evidence indicated that after making the deed Col. Wilson always treated the land in question as his own. It was on record in his name. He paid the taxes, made repairs, leased the land to tenants and collected the rents for his own use, advertised the land for sale and made and delivered a mortgage against it to secure a loan, and further, that the defendants had knowledge of and acquiesced in these things. Defendants always spoke of the land as their father's and one of them made an affidavit to that effect, stating that the land belonged to his father

and that he and his brother were tenants of their father.

The court held that under this state of facts the mere placing of the deed in the hands of one of the grantees did not of itself necessarily constitute a delivery; that in such case the inquiry was, what was the intention of the parties at that time, and such intention when ascertained should govern. It was further held that the acts of the parties amounted to a withdrawal of the deed, but that if this were otherwise, the deed was void because it was not to take effect until the death of the grantor, and that this constituted an attempt to make a testamentary disposition of the property without complying with the Statute of Wills.

In Gowald v. Caldwell, 228 Ill. 224, a bill in chancery was filed against some of the heirs-at-law of Anna Caldwell to obtain an adjudication as to the legal effect of a certain warranty deed and certain instruments in writing, by which Anne Caldwell purported to convey the real estate to the complainant, William G. Caldwell, and authorized him to make a sale of the same and distribute the proceeds to persons and societies named. It was there contended by the complainant that a trust was created by the deed and instruments for the benefit of the persons and societies named, while on the other hand it was contended that this deed and these instruments were to take effect only after the death of Anne Caldwell and were therefore testamentary in character and void. The court said that it was well settled that if the intended disposition of the property was of a testamentary character and not to take effect during the testator's lifetime, but was ambulatory until her death, such disposition was not operative unless it had been declared in writing in strict conformity with the statutory enactments regulating the making of wills. The deed was absolute in form and was handed to her son by Mrs. Caldwell, who was then 71 years of age. She did not want to make a will but wanted to arrange her

and that in and his position was removed to early father.
The court held that under this state of facts the
were binding on the land in the hands of one of the grantees and
not of itself necessarily conveyed a delivery; that in such cases
the inquiry was, what was the intention of the parties at that time,
and was intention with respect to delivery? It was the law
that the delivery of the property was a necessary condition of the
grant, but that in such cases the intention of the parties was
not to be taken into account until the death of the grantor, and that this
intention was to be ascertained from the facts and circumstances of the
case, without comparing with the intention of the parties.

In Gravelly v. Gravelly, 205 Ill. 404, a bill in equity
was filed against some of the defendants of whom Gravelly is the
plaintiff and certain trustees in writing, by which some Gravelly con-
veyed to convey the real estate to the defendants, William F.
Gravelly, and authorized him to make a sale of the same and dis-
tribute the proceeds to persons and associations named. It was shown
conceded by the defendants that a deed was executed to the land
and instruments for the benefit of the parties and their assigns,
while on the other hand it was contended that this deed and those
instruments were in fact void and that the same were null and void.
The court held that the instruments in question were valid and that
the same were well settled and that the instruments in question
of the property was of a testamentary character and not to take ef-
fect during the testator's lifetime, but was ambulatory until his
death, such disposition was not operative unless it was shown that
it was in writing in proper conformity with the statutory requirements
regarding the making of wills. The deed was admitted in form and
was executed by her and by Mrs. Gravelly, who was then 77 years of
age. The bill was to have a will put in evidence to establish her

property so that in case of her death it would in part go to certain persons and societies other than her heirs. For this purpose she made the deed and handed it to her son who did not record it but placed it in a safety deposit box where it remained until after her death. In the meantime she received the net income of the property. It was insured in her name, the taxes and repairs were paid out of the gross receipts from the property. There was no apparent change in the ownership or possession, the son handling the property for the benefit of his mother after the making of the deed just the same as before. After the deed was made the mother designated in writing the beneficiaries who should take in case of her death, saying, "If God sees fit to take me to himself before my property in Chicago is sold, I authorize you, my son, to sell it when you see fit." The son testified that it was not thought he would sell the property prior to his mother's death, but if it had been sold the proceeds would have gone to her and that he did not claim the property; that the deed was made only so that he could carry out the wishes of his mother. She sought to change the beneficiaries named in the paper handed to her son on February 10th by a subsequent paper, and he recognized her right to make the change. The court said from all these facts "we are impressed with the view that the disposition of the property was testamentary" and "a careful reading of this record shows that the intention of the parties was that the deed and the two instruments in writing above set forth should take the place of and operate as a will, and that the circuit court properly so held."

In McFarlane v. Ridgway, 100 Ill. 130, the court stated the distinction between an executory and an executed trust, and said that before a trust could arise under the agreement there construed it was necessary that there should be transferred or conveyed to a trustee to be thereafter appointed, money, personal property

property as that in case of her death it would in fact go to her
certain persons and included other than her heirs. For this reason
who made the deed and intended it so her son was all that counted in
but it was in a rather special way where it was made and after
her death. In the meantime she received the net income of the
property. It was included in her estate, the taxes and estate were
paid out of the gross receipts from the property. Therefore no
amount should be in the ownership or possession, the tax handling
the property for the benefit of his mother after the making of the
deed just the same as before. After the deed was made the mother
continued in giving the beneficiaries who should take in case of
her death, saying, "If she says this to take me in himself before my
property in Illinois is sold, I will not give you, my son, he will be
when you see this. The son said that he was not allowed to
would sell the property right in the mother's hands, but it is not
then sold the proceeds would have gone to her son and he did not
claim the property; that the deed was made only so that he could
carry out the wishes of his mother. The mother to change the
beneficiary named in the deed wanted to put her son as primary heir
by a subsequent deed, and he recognized that right to make the change.
The court said from all these facts "we are impressed with the view
that the disposition of the property was testamentary" and "a certain
testimony of this woman shows that the intention of the parties was
that the deed and the two instruments in giving above her death
should take the place of and operate as a will, and that the estate
of the property as well."

REVEREND J. J. ...
the distinction between an executory and an executed deed, and
with this point a great deal of time was spent in argument and
it was necessary that there should be a statement of the
as a finding in the case of the property.

and the proceeds of the sales of land thereafter to be made; that in order to constitute a valid gift inter vivos, possession and title must vest in and pass to the donee or in a trustee for the donee; that if anything remained to be done to complete the gift, what so remained to be done could not be enforced, as it was based upon no consideration; that when the gift was thus incomplete, there was a locus penitentie and the gift might be revoked; that where the alleged gift was of a legal estate capable of legal conveyance and no conveyance was made, the gift was revocable. Barnum v. Reed, 136 Ill. 388; Wadhams v. Gay, 73 Ill. 418; 4 Am. & Eng. Ency. of Law, pp. 1313-1318; Telford v. Patton, 144 Ill. 611. In this last case it is said:

"A gift inter vivos cannot be made to take effect in possession in future; nor will equity interpose to perfect a defective gift or voluntary settlement made without consideration; nor can equity convert an imperfect gift into a declaration of trust merely on account of that imperfection. (Young v. Young, 80 N. Y. 422.)"

The court further stated that in order to render a voluntary settlement valid and effectual, the settlor must have done everything which, according to the nature of the property comprised in the settlement, it was necessary to do in order to transfer the property and make the settlement binding upon him; that such a settlement might be effectual by transferring the property to the persons for whom he intended to provide, or by transferring it to a trustee for the purposes of settlement, or by declaring that he himself holds it in trust for those purposes; that if it was intended to effectuate the settlement by one of these modes, the court would not give effect to it by applying another of them; that if it was intended that the settlement should take effect by transfer, the court would not hold the intended transfer to operate as a declaration of trust because it would thereby convert an imperfect instrument into a perfect trust; that where the instrument

contemplated that there should be a transfer of the property to a trustee, the relation of trustee and cestui que trust did not arise until such transfer was made; that until then the person for whose benefit the voluntary settlement was made, took no estate in the property and could not enforce the agreement to make the gift or compel the alienation to the trustee; that before the alienation of the trustee, the gift was an imperfect one and a court of equity would not interfere to complete it. Wilkey v. Lord, 4 De G., F. & J. 264; Bridge v. Bridge, 16 Beav. 315; Reese v. Reese, 18 id. 285; Golyer v. Commissioners of Bulstave, 2 Bees, 82; 1 Vaisy's Law of Settlements, pp. 93, 140, 143, 145; Jeffreys v. Jeffreys, 1 Craig & Phil. 138; In re D'Aughan, L. R. 15 Ch. Div. 238.

In Otis v. Reskwith, 49 Ill. 121, a policy of life insurance on the life of assignor was voluntarily assigned by him to a trustee for the benefit of his three children. Notice of this assignment and trust was given to the company and to the trustee who accepted. The policy and assignment, however, remained in the possession of the assignor and after his decease was found among his papers. The trustee brought suit against the administrator of the assignor to compel a surrender of the policy to him and that he be declared the owner, and the court, in an opinion by Chief Justice Breese, reviewing the authorities in England and this country, held that this constituted a sufficient delivery of the assignment and resulted in a complete transfer of the title, saying:

"We place the most stress upon the first point discussed, and that is, the intention of the donor. He created the fund, apparently for the benefit of his motherless children, he did all in his power to confer upon the trustee the necessary authority to receive this fund for those children, when he should be no more; he was prompt in keeping the policy alive, by the payment of the premiums; at no time did he manifest any desire to retract, and though he occupied locus penitentiae, he did not repent of his act, but left the world with the conception that those so dear to him had been provided for."

[illegible]

In Wittmeier v. Heiligenstein, 308 Ill. 434, Josephine Wittmeier executed a deed conveying to St. Clare's Roman Catholic Church of Altamont certain real estate. The deed was for the consideration of one dollar and contained a provision that the Church "shall pay to Charles Wittmeier the sum of \$80 per month, beginning one month after my death, for and during his life, and shall pay the doctor's and hospital bill, if any, and upon his death provide him with a Christian burial and pay his funeral expenses and inter his body on the lot owned by me in the cemetery at Altamont, Illinois." This deed was held void because an unincorporated religious society was incapable in law of taking by deed, and Charles Wittmeier then filed his bill for the purpose of having the premises impressed with a trust in his favor. This bill was dismissed for want of equity. The deed to St. Clare's Church was ordered cancelled and the property partitioned among the heirs. Upon appeal to the Supreme Court it was held that, although void as a deed, the instrument created a valid trust. The court said that no particular form of words was necessary to create a trust; that the word "trust" need not be used; that it was a rule of equitable construction that there was no magic in particular words; that "any expression which shows unequivocally the intention to create a trust will have that effect. 1 Perry on Trusts, 5th ed., sec. 82; Hill on Trustees, 65; 2 Spence on Eq. Jr. 52." The court quoted as follows:

"Any agreement or contract in writing made by a person having the power of disposal over property, whereby such person agrees or directs that a particular parcel of property or a certain fund shall be held or dealt with in a particular manner for the benefit of another, in a court of equity raises a trust in favor of such other person against the person making such agreement, or any other person claiming under him voluntarily or with notice." (1 Perry on Trusts, 5th ed., sec. 82). "Nor does the rule that a conveyance without a grantee capable of receiving the grant is void apply to equitable rights growing out of such a conveyance." (18 Corpus Juris, sec. 36.) The inability of the trustee to take will not invalidate a deed where the settlor and the cestui que trust are both competent and the property is of such a nature that it can be legally placed in trust. 1 Perry on Trusts, sec. 340; Willis v. Alvey, 30 Tex. Civ. App. 96; Smith v. Davis, 99 Cal. 25."

We have now reviewed all of the cases cited to this particular point by the parties to the controversy. The gifts which the donor here attempted to make were for the most part of a charitable nature, and it is well settled by the decisions in this and other states that the fact that he reserved the interest which might accrue upon the notes to himself, would not invalidate these trusts, provided the case were sufficient in other respects. The leading case so holding is Beatty v. Eastern College, 177 Ill. 280. Northern Trust Co. v. Swartz, 309 Ill. 586, and Williams v. Evans, 184 Ill. 98, are other cases tending to establish the same rule.

It is undoubtedly true, as was held by the Supreme court in Johnson v. Fulk, 252 Ill. 326, that it is essential to the creation of a trust that there must be --

"such words or act as clearly manifest an intention that the deed shall at once become operative and effectual to pass title to the land conveyed. *** Delivery may be made to an agent of the grantee, but such a delivery must be absolute, with no right of the grantor to reclaim the deed."

In Young v. Payne, 283 Ill. 640, it was held that the failure to reserve a power in the grantor to make full disposition in the event of the death of a beneficiary before that of the grantor, coupled with the further provision reserving a life estate to the grantor, made the instrument operate as a present conveyance of the fee immediately upon the execution and delivery of the deed and relieved the transaction of its testamentary character.

The ultimate question in every case of this kind must be: What was the intention of the party? If, as a matter of fact, he succeeds in divesting himself of the legal title to the property irrevocably and placing the same in the control of the trustee for the benefit of certain beneficiaries, then the conveyance is valid notwithstanding any failure to comply with the provisions of the Statute of Wills. We confess our inability to discern any distinction between the alleged trusts that were created by the acts of

TO HAVE BEEN RECEIVED BY THE POST OFFICE AT NEW YORK

certificates given by the parties to the controversy. The first
which the donor had attempted to make was for the most part of a
mortgage certificate, but it is well known by the mortgagee in fact
and other things that the fact had been reserved for the donor which
might amount to the making of himself, which was not intended to be
true, would the same were withheld in other respects. The
leading case is holding in People v. William C. Cullen, 177 N.Y. 200.
People v. Cullen, 177 N.Y. 200, 100 N.E. 200, 100 N.E. 200.
The 177 N.Y. 200, and other cases holding in relation to the same rule.
It is accordingly held, as was held by the court
most in People v. Cullen, 177 N.Y. 200, 100 N.E. 200, 100 N.E. 200.
The question is a close one, and the court is of the
"which party or set of parties received an interest in the
fact that it was a mortgage and it was held in fact that
in the fact, the delivery may be made to an agent of
the grantor, but such a delivery must be absolute, with no right
of the grantor to reclaim the same."
In People v. Cullen, 177 N.Y. 200, 100 N.E. 200, it was held that the
failure to reserve a power in the grantor to take full possession
in the event of the death of a beneficiary before that of the
grantor, coupled with the further provision reserving a life estate
to the grantor, made the instrument operate as a testamentary conveyance
of the fee absolutely upon the execution and delivery of the deed.
The question is presented in the following manner:
The question is presented in every case of this kind that
has been the intention of the party. If, as a matter of fact,
he was in a position to take the fee at the time of the conveyance
and giving the same to the grantor of the fee, the
the estate of certain beneficiaries, then the conveyance is valid
and the fee is given to the grantor with the reservation of the
estate of others. We cannot see how it is possible to give the
fee between the parties that was given by the grantor.

the trustor in this case, and the decree does not give us much light as to the reasons which induced the adjudication of a trust as to part of the notes and the failure to adjudge trust as to the remainder of them. The property was all of the same kind, namely, promissory notes which were payable to the order of the decedent. It is apparent and uncontradicted upon the record that he desired to put these notes out of his possession and into the possession of the defendant Society in order that the proceeds of the same might be used for the benefit of certain persons and for certain charitable uses concerning the identity of which there is not a shadow of a doubt. He deliberately took these notes out of his own possession and control and transferred them into the physical control and possession of the defendant Society. Before doing so (as by the statute he had the right to do and as by the statute it was proper and appropriate to do) he endorsed each and all of these notes, with two or three exceptions which were evidently overlooked. He not only conveyed these notes to the Society, but by certain writings also delivered he made known the ultimate use of these notes, and the Society having been so informed agreed to comply with his wishes. It was of course not necessary that the beneficiaries should be informed, and he directed that they should not be until such time as he desired notice to be given. This he had a perfect right to do. It was also the normal and only wise course under all the circumstances. There are parts of the writings which he executed that might indicate that there was in his mind the thought of making a will, as, for instance, where he says that it is his will and appeals to his God and Judge as to the execution of it, or where he uses the word "codicil" in regard to a specific part of one of the writings. However, it is apparent that he was not expert in the use of the English language, and in view of that fact it is not surprising that many words were so used. If we may

entertain any doubt as to the transfer by deceased of a present estate and title in this property to the defendant Society as trustee, such doubt would be based upon the form of endorsement of the notes, as where in some of them he states, "in case of my death, pay", etc. A promissory note, however, would be perfectly good if payable at the death of a particular person, that being certain which must in all events become certain, and we do not think an endorsement made in a similar way would be any the less valid and controlling. If such a note delivered would be valid and convey a present interest, it seems such an endorsement would also be valid and when delivered would convey a present interest. Indeed a delivery with the intention to pass title is sufficient irrespective of the endorsement.

Rothwell v. Taylor, 303 Ill. 226.

It is not indispensable to the creation of a trust that all the provisions of it shall be irrevocable. That the condition of the owner's health, not only at the beginning of the transaction but at its close, was poor, his letters indicating that it was apparent to him that his death would take place in the near future, is a circumstance which indicates strongly an irrevocable intention to convey a present estate.

It is much to the credit of the defendant Society that this record discloses nothing which can be construed as an attempt on its part to influence the deceased in the disposition he was making of his property.

We think the absolute delivery of the notes with the endorsements thereon had the effect of creating a present estate in the defendant Society; that construing all these instruments together, the same may not be said to amount to a testamentary disposition which would take effect in the future and upon his death but rather to the creation of a present estate in the defendant Society in order that it might carry out the then intentions of the donor.

entertain any doubt as to the transfer by descent of a present estate and also in this respect to the defendant's estate as trustee, such doubt would be based upon the fact of inheritance of the estate, and there in some of them he states, "in case of my death, etc., etc." A preliminary note, however, would be necessarily good in regard to the facts of a particular estate, that being certain which case in all events become certain, and so to not think an inheritance made in a similar way would be any the less valid and enforceable. It would a note delivered would be valid and convey a present interest, if there were an inheritance would also be valid and then delivered would convey a present interest, and a delivery with the intent that to pass title is sufficient irrespective of the inheritance.

Defendant's Answer, Vol. 11, 12, 13.

It is not inconsistent to the question of a trust that all the questions of it shall be determined. That the condition of the grantor's death, not only at the beginning of the transaction but at his death, was good, his intention indicated that it was so. It is not inconsistent to the question of a trust that it is a circumstance which indicates strongly an intention to pass title, to convey a present estate.

It is true to the credit of the defendant's estate that this record shows nothing which can be regarded as an attempt on the part of defendant to conceal in the transaction the value of his property.

To think the estate delivery of the note with the intention to return and the effect of creating a present estate in the defendant's estate; that something all these things together, the same may not be said to amount to a conspiracy to defraud which would take effect in the future and upon his death but rather to the creation of a present estate in the defendant's estate in order that it might carry out the then intention of the donor.

It has been urged that the provisions of these trusts are uncertain and therefore void. These trusts are of a charitable nature. Trusts of that nature are (contrary to the rule in some states) favored in Illinois, and the statute of Elizabeth with reference to charitable trusts is a part of the common law of this state. We think it cannot be said that any of these trusts are more indefinite and uncertain than that sustained in Meuser v. Harris, 42 Ill. 425, where a trust was created for the worthy poor of a certain city, the income to be distributed annually in such manner as a court of chancery might direct; or in Hunt v. Fowler, 131 Ill. 269, where a trust for the widows of and for a home and school for orphans of deceased members of the Brotherhood of Locomotive Engineers, under rules and regulations to be provided by the Brotherhood, was sustained; or in Trafton v. Black, 187 Ill. 36, where the testator left the remainder of his estate to be applied by his trustee "to the erection of church buildings in that part of Illinois bounded on the north by the main line running east and west of the present Baltimore and Ohio Southwestern railway, such church buildings to be for any of the following denominations, viz: Regular Baptist, Missionary Baptist, Free-Will Baptist and Cumberland Presbyterian, or the denominations usually called by those names." In such cases the trustee named by the instrument takes powers such as may be necessary to carry out his duties, and the charitable use will be protected. Kemperer v. Kemperer, 233 Ill. 327; 1 Ferry on Trusts, sec. 262. Indeed, it is familiar law that a charitable trust will be upheld even if it should be necessary to invoke the cy pres doctrine in order to do so.

The controlling facts in this case are a clear intention of the owner of the property, the entire lack of undue influence or fraud, and the compliance of the owner with those things necessary to vest a legal title in the defendant Society as trustee

for certain beneficiaries. The record affirmatively shows that no rights of creditors have intervened, and the decree of the Superior court is therefore reversed and the cause remanded with directions to dismiss the bill.

REVERSED AND REMANDED WITH DIRECTIONS.

O'Conner, and McSurely, JJ., concur.

for certain individuals. The second difficulty arises from the fact that the system is not self-sufficient, and the system of the future must be a system of the future and not a system of the present.

THE SYSTEM OF THE FUTURE AND THE SYSTEM OF THE PRESENT.

THE SYSTEM OF THE FUTURE AND THE SYSTEM OF THE PRESENT.

IDA ALTSCHULER and ISAAC ALTSCHULER,
 Copartners doing business as
 ALTSCHULER IRON & STEEL COMPANY,
 Appellees,

vs.

CHICAGO SMELTING & REFINING
 CORPORATION, a Corporation,
 Appellant.

249 I.A. 648

APPEAL FROM MUNICIPAL
 COURT OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The statement of claim and affidavit of merits disclose that on November 9, 1925, plaintiffs at Chicago sold to defendant (with a quantity of tin and pewter) 46,600 pounds of babbitt dross of the quality known as Nos. 1, 2 and 3 at the price of 11½ cents a pound; that the goods were on board of car which was delivered to defendant and unloaded by it; that it accepted the tin and pewter and paid for the same, but on November 21, 1925, returned the babbitt dross to plaintiffs, who on December 2nd thereafter sold the same for \$8.75 per hundredweight and now sue claiming a loss of \$1,387 on the resale and damages in that amount plus freight charges of \$15.

The defendant contends that the babbitt dross was not of the quality sold and that the same was returned by agreement of the parties, defendant consenting to keep and pay for the pewter and tin while plaintiffs agreed to take back the babbitt dross.

There was a trial by the court and a finding for plaintiffs in the amount of \$1,302, on which the court entered judgment.

The controlling question in the case is whether the evidence sustains the finding as to the amount of damages.

It is apparent that the damages allowed were ascertained by finding the difference between the contract price and the price obtained by plaintiffs on the resale, plus the charge of \$15 for freight.

249 I A 348

CHICAGO, ILL. 1934

THE CHICAGO TRADING COMPANY
CHICAGO, ILL. 1934
CHICAGO TRADING COMPANY
CHICAGO, ILL. 1934

RE: CHICAGO TRADING COMPANY - THE CHICAGO TRADING COMPANY

The statement of claim and affidavit of service filed
with the court on November 7, 1934, in which the Chicago
Trading Company (with a quantity of the goods) 40,000 pounds of
washed brown of the quality known as No. 1, 2 and 3 of the
price of 15 cents a pound; that the goods were on hand of the
which was delivered to defendant and unloaded by it; that it
accepted the 40,000 pounds and paid for the same, but on November
22, 1934, returned the goods to plaintiff, who on November
24, 1934, returned the goods to defendant and the same for \$2.75 per hundredweight and
now are claiming a loss of \$1,215 in the goods and charges in
that amount and freight charges of \$15.

The defendant contends that the goods were not
of the quality sold and that the same was returned by agreement of
the parties, defendant contending to have not paid for the goods
and the said plaintiff agreed to take back the goods.
There was a trial by the court and a finding for plaintiff
(\$1,215 in the amount of \$1,215, on which the court entered judgment.
The controlling question in the case is whether the

evidence sustains the finding as to the amount of damages.
It is apparent that the damages allowed were deter-
mined by taking the difference between the contract price and
the price obtained by plaintiff in the resale, plus the charge
of 15 cents per freight.

The true measure of damages must be determined by the provisions of the Uniform Sales act (Smith-Nurd's Ill. Rev. Stat. 1927, chap. 121½, sec. 64-65.) Paragraph 3 of section 64 provides in substance that where there is an available market for the goods, the measure of damages, in the absence of special circumstances, is the difference between the contract price and the market or current price at the time or times the goods ought to have been accepted, or if no time was fixed for acceptance, then at the time of the refusal to accept.

The refusal to accept was made on November 21, 1925. Babbitt dross, the evidence shows, is composed of the residue of tin, copper, antimony and lead obtained by skimming same from the pots in which these metals are melted. No. 1 is the best grade because it contains more tin than the others. The grades Nos. 1, 2 and 3 are determined by the tin content of the babbitt dross.

Cohen, a witness for plaintiffs, (who conducted the business of the Northern Smelting and Refining Company which purchased at the resale on December 2nd) said that there was a particular market for babbitt dross in the general market; that the prices of tin and lead fluctuated on the market; that there was a market report on tin and lead every day and that the price of babbitt dross was determined by the prices of tin and lead; that a concern known as Murphy Metals or Daily Metals gets quotations by wire each day from New York which they distribute to different dealers who pay for this service. Testifying from memory, he said the market was about the same on tin on November 10th as on December 2nd, a difference of two or three cents a pound, he did not remember.

We find no evidence in the record of the fair cash market price of babbitt dross on November 21st, the day upon which defendant refused to accept, although Cohen's evidence indicates that such a price must have been easily ascertainable. As already

said, it is apparent that in computing damages the court accepted the price obtained at the resale of December 2nd.

Defendant contends that the resale may not be considered as determining the value of the babbitt dress because defendant was given no notice of the intention to sell or the time and place of the alleged sale, and it cites Barley v. Findley, 82 Ill. 524, and White Talbot Coal Co. v. Coal Co., 254 Ill. 368, which follows that case, holding that a resale, after notice to the vendee in good faith and for the best price obtainable, liquidated the damages, and that the vendor could then recover the difference between the net amount realized and the contract price.

Plaintiffs cite the opinion abstracted in Aona Evans Co. v. Hunter, 194 Ill. App. 542, holding in substance, without, however, citing any authority, that notice of resale is not required in sales which are essentially executory. Plaintiffs also contend that section 60 of the Sales act is applicable and that no notice therefore was necessary. Section 60 provides that in the resale of perishable goods, and in sales of other classes of goods which are enumerated in that section, notice of the resale to the vendee is not necessary. This record, however, discloses no proof that the goods resold fall within any of the classes enumerated in that section. It must therefore be held not applicable.

Cases cited by the parties do not involve the consideration of contracts to which the provisions of the Uniform Sales act are applicable, since that act became the law of this state on June 29, 1915, subsequent to the time when the contracts construed in these cases were made.

However, section 60 is not inconsistent with former decisions of our Supreme court in construing the same classes of transactions which it describes, the following decisions holding

with 100% accuracy. The results of the experiments are shown in Table 1.

...and

...and you have a lot of other things to do.

It is requested that you advise the Bureau of the results of your investigation.

and the use of the word "and" in the second sentence of the first paragraph of the first section of the act.

...and

[illegible]

It is noted that the above information was obtained from the files of the FBI, and is not to be used for any other purpose than that for which it was obtained.

100-443887-100

ALL THE INFORMATION ABOUT HIS WORK AND THE FACTS, NAMES AND DATES

...and the

CONFIDENTIAL

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on the 11th of June 1941, the following information was received from the Ministry of the Interior:

Send me a check for \$100.00 and I will be glad to send you a check for \$100.00.

and of their activities in relation to the various movements and organizations.

To remain with To see at the above address to 1000

SECRET and the material, whether sent in confidence or not, shall remain

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For each month of the year, the following information is provided:

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Amount due for subscription for 1900, received

to provide some additional information at this point in the process.

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that no notice of resale is necessary: Ullmann v. Kent, 80 Ill. 271; Maulding v. Steele, 108 Ill. 544; Flumb v. Campbell, 139 Ill. 101; Morris v. Wibaux, 159 Ill. 627; Wrigley v. Carrelline, 163 Ill. 92. In some of these cases it was held that the right to notice had been waived. Section 64 of the Uniform Sales act, which is applicable to this transaction, seems to be silent on the right of the seller to ascertain his damages by a resale in cases to which it is applicable. However, if we assume that notice of the resale as a matter of law in such case was not necessary, the failure to give notice may nevertheless have great weight as a matter of fact and may be considered with all the other circumstances in determining whether the price obtained should be regarded as the fair cash market value on the date defendant refused to accept the goods. As we have already pointed out, the evidence for plaintiff shows that the prices of tin and lead, on the basis of which the price of babbitt brass was determined, varied from day to day, and there is no evidence tending to show what the price was on the day of refusal, November 21st. The resale December 2nd did not determine the amount of damages which should be allowed. The circumstance appearing which constrains us to so hold is the lack of notice either to the defendant or to others; that the babbitt brass was not sold by itself but in combination with other goods of a different quality; that there is no proof that the sale was for the best price obtainable; and that proof of the price on the day of refusal could have been ascertained.

The burden of proof was upon the plaintiffs to establish their damages by a preponderance of the evidence. They were obligated to obtain the highest possible price in order to mitigate the damages as much as possible. The evidence fails to disclose that such price was obtained at this resale. It follows that the

that no notice of venue is necessary; Winn v. Hall, 20 Ill. 271.
271: Winn v. Hall, 20 Ill. 271; Winn v. Hall, 20 Ill. 271.
101: Winn v. Hall, 20 Ill. 271; Winn v. Hall, 20 Ill. 271.
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failure to give notice may nevertheless have great weight as a cir-
cumstance of fact and may be considered with all the other circumstances
in determining whether the price obtained should be regarded as
the fair and correct value at the date defendant refused to ac-
cept the goods. As we have already pointed out, the evidence in
this case shows that the market at the time and place of resale of
which the price of defendant's goods was determined, varied from day
to day, and there is no evidence tending to show that the price
was on the day of refusal, defendant's best. The resale was
and did not determine the amount of damages which should be al-
lowed. The circumstances appearing which constituted it to be
held to the lack of notice either to the defendant or to others;
that the defendant's goods were not sold by himself but in connection
with other goods of a different quality; that there is no proof
that the sale was for the best price obtainable; and that goods
of the same or the same or better quality might have been resold.
The burden of proof was upon the plaintiff to estab-
lish their case by a preponderance of the evidence. They were
obligated to obtain the highest possible price in order to mitigate
the damages as much as possible. The evidence fails to disclose
that such price was obtained at this resale. It follows that the

damages allowed are not sustained by the evidence, and for the reason indicated the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

O'Connor, P. J., and McSurely, J., concur.

add the low, positive end of bedframe for one handle against
treatment area and low handle of control and adjustment system

JOURNAL OF CLIMATE

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CLARA TARRANT,
Plaintiff in Error,

vs.

AMERICAN MUTUAL INDEMNITY CO.,
a Corporation,
Defendant in Error.

ERROR TO SUPERIOR COURT

OF COOK COUNTY.

MR. JUSTICE HATCHETT DELIVERED THE OPINION OF THE COURT.

In an action of assumpsit, at the close of plaintiff's evidence, the court granted the motion of defendant for an instructed verdict, which was returned, and entered judgment against plaintiff for costs. It is argued here that the court erred in directing the verdict.

The declaration was in two counts and in substance alleged that on January 11, 1926, plaintiff sustained a personal injury through being struck by an automobile negligently driven by one Voss; that on May 13, 1926, plaintiff instituted suit against Voss for damages on account of this injury; that Voss appeared and that the cause was placed on ^{the} trial calendar of the Superior court; that the cause came on for trial, and in consideration of the promise of plaintiff to dismiss the suit and give a release, the American Mutual Indemnity Company agreed to pay plaintiff \$350; that plaintiff has at all times been ready to perform these promises and on several dates offered to do so upon payment of the money as agreed, but defendant refused to pay the same. An affidavit of claim was attached to the declaration.

The defendant filed a plea of the general issue and an affidavit of merits which averred that defendant agreed to pay plaintiff \$250 and that Voss agreed to pay her \$100; that defendant had paid all it had agreed to pay, namely, \$250, to plaintiff's attorneys.

Upon the trial the declaration in the tort case

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TO THE COURT
OF THE COUNTY

IN SENATE
OF THE STATE OF NEW YORK
JANUARY 11, 1935
IN SENATE
OF THE STATE OF NEW YORK
JANUARY 11, 1935

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against Voss was by agreement admitted in evidence with pleas of not guilty and non-ownership which were filed in that suit by him.

Raymond C. Schnell, an attorney, then testified that representing the plaintiff he had prepared the case for trial and brought the witnesses to court; that he appeared in court on May 24, 1927, and that he and representatives of the defendant were instructed by the court to be present the following morning prepared to go to trial; that he instructed all his witnesses to be present; that one Miller afterwards telephoned informing him that he was representing the American Mutual Indemnity Company and asked him what he would take in settlement of the case. The witness told Miller he would consider the matter and call him back, and Miller asked the witness to stop at his, Miller's, office, which was in the same building as the office of the witness; that before calling Miller up the witness telephoned to Mr. Bloomington, the attorney for the defendant, and informed him that Miller had called with reference to a settlement of the case, and that Bloomington told the witness to go right ahead and make the settlement with Miller; that he telephoned Miller accordingly, and after talking back and forth Miller said the insurance company was disposed to pay \$350, that it would probably take a week before the money was available, and the witness said that would be all right; that he would not proceed to force the case to trial the following morning, and that he secured a continuance of the case generally; that at the end of the week he talked with Mr. Cobb of Mr. Miller's office and asked him when the check would be forthcoming; that Cobb said it would be around in a day or two, and that he finally sent a draft to the witness for \$250 with a release on the back of it; that the witness informed Miller that he would not have plaintiff sign the release unless he received a check for \$350, which Miller refused to give; that the witness tendered a release executed by plaintiff

against them was by agreement admitted in evidence with a view of
and equity and non-ownership which were filed in that suit by him.
Edward C. Bennett, an attorney, then testified that
testimony in the plaintiff's case was given the case for trial and
presented the witness in court; that he appeared in court on May
24, 1937, and that he and representative of the defendant were
instructed by the court to be present the following morning and
order to go to trial; that he instructed all the witnesses to be
present; that one Miller afterwards telephoned informing him that
he was present and the American Mutual Indemnity Company was named
as what he would have in settlement of the case. The witness told
Miller he would consider the matter and call him back, and Miller
called the witness on May 24, 1937, Miller's office, when he
was gone during the office of the witness; that before calling
Miller by the witness telephoned to Mr. Blockington, the attorney
for the defendant, and informed him that Miller had called with
reference to a settlement of the case, and that Blockington told
the witness to go with Blockington and make the settlement with Miller;
that he telephoned Miller accordingly, and after talking back and
that Miller told the defendant company was allowed to pay \$200.
That it would probably take a week before the money was available,
and the witness said that would be all right; that he would not
proceed to take the case to trial the following morning, and that
he secured a continuance of the case generally; that at the end
of the week he talked with Mr. Blockington's office and
asked him when the check would be forthcoming; that Blockington
would be around in a day or two, and that he finally went a trip
to the witness for \$200 with a release on the date of 16; that the
witness informed Miller that he would not have anything else the
release since he received a check for \$200, which Miller refused
to give; that the witness continued a release executed by plaintiff

and her husband and a stipulation dismissing the case, and told Miller that he would insist on having that amount and was prepared to carry out the agreement as made; that Miller refused to take the draft for \$250, refused to accept the release or the stipulation and refused to pay \$350. Plaintiff then rested his case, and at the request of defendant the court gave the instruction as already stated.

The only contention of the defendant is that in making the contract to pay \$350 as proved, the insurance company acted as agent for Voss and that the cause of action as proved is against Voss and not against the insurance company. There is no evidence in the record tending to sustain this contention, nor is it raised in the affidavit of merits.

The court clearly erred in giving the instruction and for that error the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

O'Connor, P. J., and McSurely, J., concur.

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249 I.A. 649¹

WILLIAM EUGENE LESLIE, a Minor,
by ADDIE MILLER, his Next Friend,
Appellant,

vs.

CITY OF CHICAGO, a Corporation,
Appellee.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

RE. XXXXXXXXXX JUNIOR KEYNOTE

DELIVERED THE OPINION OF THE COURT.

This is an appeal by the plaintiff from a judgment entered on the verdict of a jury as instructed by the court at the close of plaintiff's evidence.

The action was in case, the declaration alleging that on June 19, 1925, the City controlled certain streets within its corporate limits which it was its duty to use reasonable care to keep in a reasonably safe condition; that for a long time prior thereto defendant suffered and permitted large holes and depressions to remain in these streets, particularly in front of No. 4013-20 Prairie avenue; that defendant had notice thereof, and that upon that day plaintiff was a passenger in an automobile which was being driven north on Prairie avenue in said city, exercising all due care and caution for his own safety, when the automobile struck a hole or depression in the street, causing plaintiff to fall from the automobile upon the pavement, injuring him. The defendant filed a plea of the general issue.

Tending to sustain the issues, plaintiff proved upon the trial that at the time of the injury he was 16 years of age; that he was sitting in the back seat of an open touring car belonging to one Martin Hogan; that he was in the rear seat alone, and Martin Hogan and Jessie Fitzgibbons, his friends, were in the front seat;

that they turned off Forty-third street north onto Prairie avenue and were going down Prairie avenue when the automobile hit two of

248 A. I. 848

1938

THE STATE OF TEXAS, COUNTY OF DALLAS.

IN SENATE, FEBRUARY 1, 1938.

REPORT OF THE COMMISSIONER OF THE STATE DEPARTMENT OF AGRICULTURE, FOR THE YEAR 1937.

BY

JOHN W. HARRIS, COMMISSIONER.

REPORT OF THE COMMISSIONER OF THE STATE DEPARTMENT OF AGRICULTURE, FOR THE YEAR 1937.

DELIVERED THE SEVENTH DAY OF FEBRUARY, 1938.

THIS IS AN ACT OF THE LEGISLATURE OF THE STATE OF TEXAS, PASSED AT THE REGULAR SESSION, FEBRUARY 1, 1938.

SECTION 1. The Commissioner of the State Department of Agriculture is authorized to publish this report.

SECTION 2. The report shall be printed in the English language.

SECTION 3. The report shall be printed in the English language.

SECTION 4. The report shall be printed in the English language.

SECTION 5. The report shall be printed in the English language.

SECTION 6. The report shall be printed in the English language.

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SECTION 17. The report shall be printed in the English language.

SECTION 18. The report shall be printed in the English language.

SECTION 19. The report shall be printed in the English language.

SECTION 20. The report shall be printed in the English language.

these large holes in front of No. 4018 or 4020; that the fall into the first hole bounced plaintiff up so that he lost his seat; that they then hit another hole, he lost his hold on the top and rolled off, which was the last he could remember. Plaintiff fell to the pavement and was severely injured.

One Stoltz was produced as a witness and testified that he had lived around the place of the accident for three years and had observed the condition of the street there, but when asked what the condition was, defendant objected and the court said, "That won't do." This witness was again asked if he had observed the condition of the street as to repairs, and he said, "Yes," but upon objection by the defendant the court said, "Not interested in the condition of the street," and the plaintiff took an exception. Another witness, who stated that he had lived at 4020 Prairie avenue for six years and that he walked across there nearly every day at that time of the year, was asked if he had observed the condition of the street and replied that he had, but upon being questioned as to what the condition was, defendant again objected and the court sustained the objection, to which plaintiff took an exception. Plaintiff then rested, and the instruction to find for the defendant was given by the court.

We think the excluded evidence was admissible as tending to show constructive notice to the City of the condition of the street prior to the accident and that the court erred in excluding it. Moreover, there was some evidence in the record from which notice might have been inferred, and it was therefore error to instruct the jury to find for defendant.

For these errors, the judgment is reversed and the cause remanded for another trial.

REVERSED AND REMANDED.

O'Connor and McCurely, JJ., concur.

PAUL E. FLEMING,
Appellant,

vs.

LUCIA A. WARD,
Appellee.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

MR. JUSTICE HATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the complainant from an order which sustained a demurrer to plaintiff's second amended bill of complaint and dismissed the same for want of equity, and the controlling question in the case is whether the court erred in sustaining the demurrer and dismissing the bill.

If the well pleaded facts stated such a case as that a court of equity would give relief, the demurrer should not have been sustained.

The facts as set forth in the second amended bill are that on July 27, 1911, Paul E. Fleming was the owner in fee simple of an undivided one-half interest in certain premises in Chicago described as Lots 1 and 4 in Block 12 in Wadendale, etc.; that on that date he was also seized of the entire legal title in fee simple of certain premises located in Chicago, described as lot 16, except, etc., and lot 17 in Wadsworth's Subdivision of Block 5 in the second plat of Woodlawn, etc.; that this last described property was on that date subject to the equitable right of John E. Ward, who has since died, to an undivided one-half interest, which right arose through a mutual mistake in a deed of conveyance dated March 14, 1911, from said John E. Ward to Paul Fleming; that both pieces of property were on July 27, 1911, subject to a first mortgage of \$75,000 and to a second mortgage of \$25,000; that prior to that date Paul E. Fleming and John E. Ward had been engaged in the business of trading in cattle and real estate under an oral

5- 243 A. 1. 648

ATTEST: JOHN W. WILKINSON, CLERK

IN WITNESS WHEREOF, I HAVE HEREUNTO SIGNED MY HAND AND SEAL OF OFFICE, THIS 10TH DAY OF JULY, 1921.

JOHN W. WILKINSON, CLERK

JOHN W. WILKINSON, CLERK

THE STATE OF ILLINOIS, COUNTY OF COOK, CITY OF CHICAGO.

BEFORE ME, the undersigned authority, on this day personally appeared

JOHN W. WILKINSON, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

My commission expires on the 10th day of July, 1921.

IN WITNESS WHEREOF, I have hereunto set my hand and seal of office, this 10th day of July, 1921.

JOHN W. WILKINSON, CLERK

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JOHN W. WILKINSON, CLERK

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agreement; that the real estate was purchased by the partnership on February 21, 1911, from Daniel Duffin and wife and Isabella Curran and husband; that complainant and John E. Ward each contributed one-half of the purchase price paid for this real estate and that they jointly assumed the obligations existing upon the real estate at the time of its purchase; that on July 13, 1911, a bill in chancery was filed in the Superior court of Cook county by John E. Ward against the complainant, alleging among other things, the existence of the partnership and praying for an accounting and settlement of the affairs of it; that about the same date a similar bill in chancery was filed in the Circuit court of Beadle County, South Dakota, and that subsequent thereto complainant and John E. Ward entered into an agreement for a settlement of the affairs of the partnership; that under this agreement Ward promised to dismiss these bills in chancery and assume an indebtedness of the partnership aggregating \$30,000; that the complainant agreed among other things to convey certain South Dakota lands to John E. Ward and to execute and deliver to John E. Ward three promissory notes for \$5,000 each, payable on or before July 27, 1913, July 27, 1914, and July 27, 1915, respectively, with interest at the rate of eight per cent per annum; that it was agreed between complainant and Ward mutually that these notes aggregating \$15,000 should be in payment of the complainant's share of the \$30,000 partnership indebtedness which John E. Ward assumed; further, that to secure the notes, complainant should convey to John E. Ward an undivided one-half interest in and to the real estate described, which conveyance should be security only, and that John E. Ward should re-convey to the complainant an undivided one-half interest in and to said real estate upon the payment of the notes; that on July 27, 1911, complainant did execute the three notes and made the conveyance by two deeds absolute in form; that the deeds were dated July 27, 1911,

and recorded in the Recorder's office, copies of which were attached to the bills as Exhibits "A" and "B" and by reference made a part of it.

The bill averred that these notes were renewed on September 23, 1915, each for the principal sum of \$5,000 due October 1, 1917, July 1, 1918, October 1, 1918, respectively, with interest at six per cent, and that on November 30, 1917, these notes were assigned by Ward to the defendant, Lucia A. Ward; that the assignment was gratuitous, and that at the time of the assignment the defendant, Lucia A. Ward, had notice of the rights of complainant in and to the real estate. The bill also averred that defendant obtained judgment on said renewal notes on October 6, 1924, in the Circuit court of Beadle county, South Dakota, of \$34,272.30.

The bill also averred that prior to the execution of the two deeds, Exhibits "A" and "B", Ward executed and delivered to complainant a conveyance dated March 14, 1911, which is marked as Exhibit "C" and made a part of the bill; that it was mutually intended that this deed should convey and vest in Fleming only an undivided one-half interest to all the premises described in paragraph 1 of the bill, but that by a mutual mistake the interest to be conveyed was misdescribed; that prior to September 23, 1915, and after the execution and delivery of the deeds of July 27, 1911, Ward discovered this error and on September 23, 1915, represented to the complainant that because of the error complainant was still the holder of the record title of an undivided one-half interest in Lots 16 and 17 in Wadsworth's subdivision, whereas it was the intention that after the execution and delivery of the deeds of July 27, 1911, the legal title by way of security to all the property should be vested in Ward to secure the indebtedness of the complainant evidenced by the three notes for \$5,000 each which

have been described; that Ward represented that in order to renew the mortgage existing upon the premises for the benefit of both the complainant and Ward, the correction of the error in the record title was necessary; that he requested complainant to execute a quit-claim deed to the property and a consent to proceedings being taken for the sole purpose of placing the record title in Ward; that the complainant indicated his willingness to do this to carry out the intention of the parties and to convey the whole legal title to Ward as security for the indebtedness of the complainant, and that on September 23, 1915, he executed and delivered a quit-claim deed which was afterwards recorded and which is attached to and made a part of the bill as Exhibit "E"; that he also executed and delivered a power of attorney dated September 23, 1915, which is by reference made a part of the bill as Exhibit "E"; that on August 27, 1921, Ward filed a bill in chancery in the Circuit court of Cook county, a copy of which is attached to and made a part of the bill as Exhibit "F"; that by his bill he prayed that the deed dated July 27, 1911, which is marked Exhibit "A" should be reformed; that an attorney entered the appearance of the complainant in that cause and filed an answer to said bill, a copy of which is attached to the bill; that a decree was entered in that cause on September 20, 1921, by consent (which decree is also made a part of the bill) reforming the deed of the complainant to John A. Ward.

The bill averred that no consideration was given to Fleming for the quit-claim deed, the power of attorney, or the consent decree; that when the documents were executed Ward reaffirmed the interest of the complainant in said property and represented that the proceedings so taken were for the mutual benefit of the complainant and Ward, and that it was not intended by the proceedings to cut off the complainant's equity of redemption in the premises, but on the contrary, at the time of the execution of the

have been described; that Ward requested that in order to remove
the mortgage relating upon the premises for the benefit of both
the complainant and Ward, the execution of the same in the year
and little was necessary; that he requested completion to execute
a quit-claim deed to the property and a conveyance to respondents
being taken for the same without at all times, this in
fact; that the complainant intended his willingness to do this
to carry out the intention of the parties and to remove the same
from title to Ward as security for the indebtedness of the com-
plainant, and that on September 22, 1915, he executed and delivered
a quit-claim deed which was afterwards recorded and which is return-
ed to and made a part of the bill as Exhibit "E"; that he also
executed and delivered a power of attorney dated September 22, 1915,
which is by reference made a part of the bill as Exhibit "F"; that
on August 27, 1915, Ward filed a bill in chancery in the Circuit
Court of Cook County, a copy of which is attached to and made a
part of the bill as Exhibit "G"; that by his bill he prayed that the
deed dated July 27, 1915, which is named Exhibit "A" should be re-
formed; that an attorney entered the appearance of the complainant
in that cause and filed an answer to said bill, a copy of which is
attached to the bill; that a decree was entered in that cause on
September 15, 1915, by consent (which decree is also made a part
of the bill) reforming the deed of the complainant to John A. Ward.
The bill averred that no consideration was given to
Ward for the quit-claim deed, the power of attorney, or the
consent decree; that when the documents were executed Ward re-
turned the interest of the complainant in said property and re-
sented that the proceedings as taken were for the actual benefit of
the complainant and Ward, and that it was not intended by the pro-
ceedings to put out of the complainant's equity of redemption in the
premises, but on the contrary, at the time of the execution of the

quit-claim deed and power of attorney, namely, September 23, 1915, the complainant renewed the indebtedness by delivering the notes described in paragraph 2 of the bill; that the proceedings to correct the deed were taken solely for the purpose of consummating the transactions between the complainant and Ward of July 27, 1911, as intended by them at the time, whereby complainant was to convey to Ward an undivided one-half interest in the real estate described, as security for the indebtedness represented by the notes; that the consent of the complainant given to the consent decree without consideration, was not intended by the parties, nor did the decree purport to cut off the equity of redemption of Fleming nor adjudicate the question of whether the conveyances by the complainant to John E. Ward were indefeasible conveyances or given by way of security.

The bill also averred that Ward conveyed the premises on August 7, 1922, to defendant Lucia A. Ward, his wife, and that she gave no consideration for the conveyance; that she had notice of the rights of the complainant in and to the premises and notice that her grantor held an undivided one-half interest in the premises as security only for the payment of the notes which were assigned on November 30, 1917, by John E. Ward to the defendant Lucia A. Ward.

The bill also averred that John E. Ward was in possession of the premises and collected the rents and profits from July 27, 1911, to November 30, 1917, and that Lucia A. Ward has been in possession since and up to the present time, collecting the rents and profits. The bill averred the death of John E. Ward in August, 1922, and says that he never during his lifetime, by conduct or words, denied the right of complainant to redeem, but on the contrary repeatedly in writing confirmed complainant's interest therein and promised to reconvey.

The bill waived answer under oath and prayed for an

will claim that and power of attorney, January 22, 1912.
The court found that the information by which the notes
described in paragraph 1 of the bill; that the proceeds of the
loan had been used for the purpose of manufacturing
the furniture between the mortgage and date of bill, 1911,
as indicated by them at the time, whereby commitment was to carry
it back an undivided and-half interest in the real estate described,
as security for the indebtedness represented by the notes; that the
statement of the commitment given to the mortgagee before the
execution, was not indicated by the parties, nor did the parties
want to put the equity of redemption at William's disposal
the question of whether the proceeds by the commitment to John
H. Ward were intelligible conveyed or given by way of security.
The bill also averred that Ward conveyed the premises
on August 7, 1910, to defendant John A. Ward, his wife, and that
the first mortgage was the mortgage; that the first mortgage
by the title of the commitment is not in the records and was
that but greater held an undivided one-half interest in the
premises as security only for the payment of the notes which were
executed on November 21, 1911, by John H. Ward to the defendant
John A. Ward.
The bill also averred that John H. Ward was in possession
of the premises and collected the taxes and profits from July
27, 1911, to November 21, 1911, and that John A. Ward has been
in possession since and on the ground that defendant John A. Ward is
and entitled. The bill prayed the court to grant a decree
that, and that the court order the defendant, to execute a
warrant, to the right of commitment to John A. Ward on the same
terms as in the original commitment in which the interest therein
was stated to be security.

The bill prayed a decree under oath and prayed for an

accounting, a reconveyance after payment of the debt due and for other and further relief.

It is contended by the defendant that the bill cannot be maintained because it constitutes a collateral attack upon the consent decree entered September 27, 1931, and it is argued that the effect of that decree was to vest a fee simple title absolute in John E. Ward and that Lucia A. Ward, being in privity with John E. Ward, has a similar title not subject to attack. Irrespective of the point made by the complainant that two separate and distinct properties are here involved, only one of which was involved in that suit, we do not think that this contention can be sustained. The bill set up the whole decree entered by consent as well as the pleadings upon which it was entered, and an examination of the same discloses that there was no intention of the parties that the issue which is here raised should be determined in that suit. Whether the deed was absolute or a mortgage, is not even remotely referred to in the pleadings nor in the decree entered. The sole purpose of that decree, so far as the pleadings disclose, was to correct what was conceded to be an error by the parties to the deed. It did not undertake to adjudicate the nature of the conveyance. As is stated in 34 Corpus Juris, 915:

"The true test of the conclusiveness of a former judgment in respect to particular matters is identity of issues."

It is difficult to conceive that an issue has been adjudicated where the pleadings show that it was not in the minds of the parties at all.

In the next place it is contended that the demurrer was properly sustained because the bill upon its face shows that the complainant was guilty of laches. In this connection it is pointed out that complainant's deed to Ward is dated July 27, 1911; that in 1915 complainant gave a quit-claim deed to Ward; that the suit to reform

...a recommendation after payment of the debt was not ...
...and further relief.

It is contended by the defendant that the bill cannot
be maintained because it constitutes a collection of a debt
amounting to over \$100,000, and it is stated that
the effect of said statute was to make the claimant liable

in John E. Ward and John A. Ward, being in private with
John E. Ward, was a similar bill not subject to attack. These
negative of the claim made by the defendant that two separate and
distinct properties are here involved, and one of which was in-
cluded in that bill, so that it is contended that the
statute. The bill not to the claimant's benefit by reason
as well as the plaintiff's own bill is not subject to an objection

that of the same defendant that there was no intention of the
plaintiff that the claimant should be informed
in that bill. However, the fact was admitted at a hearing, in 1902
was properly referred to in the plaintiff's bill in the answer and
there. The sole purpose of that answer, as far as the plaintiff
is concerned, was to prevent the claimant from being an owner of the
property of the claimant. It is not necessary to elaborate the
nature of the controversy. As it is stated in 34 Johns 441, 442:

"The true test of the constitutionality of a law is to be found
in respect to whether it is in violation of the Constitution."

...the plaintiff in answer that he had no other
affected with the plaintiff's bill if it was not in the hands
of the plaintiff of all.

...in the year 1902 it is contended that the defendant was
legally entitled to the bill upon the fact that the claimant was
guilty of a crime of larceny, in violation of the law of the State
and the defendant's bill is based upon the fact that the claimant
was guilty of a crime of larceny, in violation of the law of the State

the deed was thereafter instituted, and that the consent decree was entered on September 22, 1921; that complainant was in default on his notes which became due in 1913, 1914 and 1915, and after renewal the notes became due in 1917 and 1918, since which time he has been continually in default, and that the original bill in the present case to declare the deed a mortgage was not filed until 1923, and the second amended bill which we are now considering was not filed until November 9, 1927.

It is urged that the rule is that laches depend upon the facts and circumstances of each case and that while it is true in some cases that the period of time for the purpose of fixing laches is that of the statute of limitations, which is ten years, yet a shorter period will constitute laches if it appears that the party chargeable was under duty to speak and should have done so under the circumstances.

It is urged that there is no reason shown for the delay until 1923, and following the original bill no excuse for delaying more than four years after the original bill was filed before filing the second amended bill of complaint. There are two answers to this contention - first, that the bill excuses the delay up to the time of the death of John E. Ward by the averment that at all times he recognized the rights of complainant as set forth in the bill, and the other that in Locke v. Caldwell, 91 Ill. 417, as followed in Jackman v. Lynde, 129 Ill. 72, the doctrine seems to be affirmatively established with reference to the time within which mortgagees may redeem from mortgagees in possession, that their rights are mutual and that the only limitation which may be applied by a court of equity is that of the statute of limitations.

We think the court erred in sustaining the demurrer and in dismissing the bill, and for that error the decree is reversed and the cause remanded.

REVERSED AND REMANDED.

O'Connor, P. J., and McSurely, J., concur.

NELL NELD ROMPHEI,
Appellant,

vs.

UNION BANK OF CHICAGO,
a Corporation,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The plaintiff sued to recover the sum of \$2802.68 paid to defendant under a written contract for the purchase of three lots in a subdivision known as "Calumet Terrace Deluxe."

She alleged in her statement of claim that about February 11, 1925, she made a contract with the defendant for the purchase of Lots 18, 19 and 20 in Block 6 of this subdivision, and that by the terms of the contract the purchase price was \$3,750, payable in installments; that she paid \$2802.68 thereon; that at the time of the execution of the contract defendant exhibited to her a plat of the subdivision purporting to show the location and dimensions of the property purchased, which was represented to be a true and correct copy of the original plat of the subdivision; that these representations were false and untrue, made for the purpose of inducing her to enter into the contract; that she relied thereon and was damaged thereby.

The statement also averred that on or about March 4, 1925, the defendant caused a plat of a subdivision of that name to be recorded in the Recorder's office, which was entirely different from the plat exhibited to plaintiff at the time she entered into the contract; that the streets and blocks in the plat recorded were entirely different from those shown in the plat from which she made her purchase and the location of the lots purchased was entirely different; that this plat was recorded without her knowledge, and that through causing the same to be recorded it has become

243. A. I. 643

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ATTEST: JOHN W. KENNEDY, CLERK

OF CHICAGO.

THE CITY OF CHICAGO,
April 10, 1914.

VS.

THE BANK OF CHICAGO,
a corporation,
Defendant.

IN SENATE: JAMES M. HANCOCK, CLERK OF THE SENATE.

The plaintiff does hereby certify that the sum of \$100.00

has been received by the plaintiff for the purpose of

being paid in a subscription known as "Chicago's Future."

The said sum was received by the plaintiff on the 10th day of

April, 1914, and was received by the plaintiff for the purpose

of being paid in a subscription known as "Chicago's Future."

The sum of the said subscription was \$100.00, payable in

installments; that the said \$100.00 was received by the

plaintiff on the 10th day of April, 1914, and was received

by the plaintiff for the purpose of being paid in a

subscription known as "Chicago's Future," which was received

by the plaintiff for the purpose of being paid in a

subscription known as "Chicago's Future," which was received

by the plaintiff for the purpose of being paid in a

subscription known as "Chicago's Future."

The plaintiff also certifies that on or about March 1,

1914, the defendant caused a list of a subscription of that name to

be furnished to the plaintiff's office, which was entitled "Chicago's

Future" and which was entitled to the sum of \$100.00.

The defendant, that the above and above in the list received

were entitled to the sum of \$100.00 in the list from which

the sum was received and the payment of the list received was

entirely correct; that the list was received by the plaintiff

on the 10th day of April, 1914, and was received by the plaintiff

impossible for defendant to perform its contract. She averred that immediately upon learning of the recording of this plat she demanded the return of payments made by her, which demand was refused, and she therefore claimed the right to receive the return of the money paid by her with interest.

The affidavit of merits averred that defendant entered into the contract of February 11th as trustee; admitted that plaintiff paid to defendant as trustee the sum of \$9802.68, but denied the false representations as alleged and denied that on or about March 4th the defendant caused a plat of the subdivision to be recorded in the Recorder's office as alleged, or that it did anything to make impossible the performance of the contract. The affidavit also denied any immediate demand of plaintiff for the return of her money as alleged, but averred on the contrary that plaintiff went upon the property and saw how the streets and blocks had been laid out on a plat of the same kind as was recorded and that she continued thereafter to make payments.

There was a trial by the court, a finding for the defendant, and judgment for costs against the plaintiff.

The defendant contends, citing no authority, however, that since the title of record to the real estate in question was in the name of defendant as trustee, and since the contract was signed by defendant as trustee, plaintiff was charged with notice that defendant was not personally liable.

The word "trustee" written after the name of defendant in the documents is discretionary and without legal effect so far as liability is concerned, in view of the absence of a stipulation in the contract for non-liability. Davall v. Craig, 2 Wheat. 45; Taylor v. Davis, 110 U. S. 330; Wahl v. Schmidt, 307 Ill. 331; Austin v. Parker, 317 Ill. 348; Schumann-Heink v. Tolson, 328 Ill. 321.

responsible for defendant's actions in contract. The money was
immediately upon learning of the recording of this and the
the return of property made by her, which amount was returned, and
the defendant retained the right to receive the return of the money
paid up her own interest.

The affidavit of service averred that defendant entered
into the contract of February 1934 as trustee; admitted that plain-
tiff paid to defendant as trustee the sum of \$2500.00, and denied
the false representations as alleged and denied that on or about
March 1934 the defendant caused a list of the subdivisions to be re-
corded in the Recorder's Office as alleged, or that it was any-
thing to make impossible the performance of the contract. The
affidavit also denied any immediate debt or liability for the
return of her money as alleged, but averred on the contrary that
plaintiff went upon the property and saw how the streets and blocks
had been laid out on a plan of the same kind as was recorded and
that she continued thereafter to make payments.

There was a trial by the court, a finding for the de-
fendant, and judgment for costs against the plaintiff.
The defendant appealed, filing an affidavit, November,
1934, after the trial of record in the trial court in question was
in the case of defendant as trustee, and also the contract was
altered by defendant as trustee, plaintiff was charged with notice
that defendant was not personally liable.

The word "trustee" written after the name of defendant
was in the contract as CHARLES H. HARRIS and JOHN J. HARRIS.
That no fee or liability be concerned, in view of the absence of a
obligation in the contract for non-liability. CHARLES H. HARRIS,
2 West 1st Street, St. Louis, Mo. 8. 1934; JOHN J. HARRIS, 107
111. 1934; JOHN J. HARRIS, 107 111. 1934; JOHN J. HARRIS, 107 111. 1934.
END ALL. 1934.

Defendant also contends that since no propositions of law were tendered nor errors argued as to the admission or exclusion of evidence, no question is presented for the determination of this court, citing Long Bell Co. v. Central Com. Co., 178 Ill. App. 7, and Keating v. Springer, 146 Ill. 481. The latest authorities do not sustain the rule for which defendant contends. (See Parisian Novelty Co. v. Advertising Mfrs. Co., 248 Ill. App. 162.)

Plaintiff contends that the contract is void and that she is entitled to the return of her money because the contract was made in violation of section 5, chapter 109 of the Illinois Rev. Stat. (See Smith-Hurd's Ill. Rev. Stat. 1927, pp. 2065-66.) We think Goddington v. Hablit, 49 Ill. App. 66, holds to the contrary.

The controlling question in the case is whether the finding and judgment of the trial court are manifestly against the preponderance of the evidence. The finding of the court is entitled to the same weight as a verdict of a jury. The determination of this question requires a consideration of the evidence.

The contract is in writing, and a photostatic copy of it is in evidence. It appears to have been executed February 11, 1928. By its terms the defendant agreed to convey to plaintiff, upon certain payments being made by her, lots 18, 19 and 20 in Calumet Terrace Deluxe, a subdivision, etc., in Cook county, Illinois. The contract is in printed form, describes itself as "Articles of Agreement for Deed," has printed thereon "H. B. Reading, Chicago." The date, the name and address of the vendee, the number of the lots, the number of the block, the consideration and terms of payment are typewritten in appropriate blanks. The name of the official executing for defendant and the name of the plaintiff are written in ink, and the word "Seal" &

is printed after plaintiff's name. The document is acknowledged before a notary public. On the back of this agreement appears a plat of a subdivision, above which appears, in print of the same size as that of the same words on the face of the contract, "Calumet Terrace Deluxe." At the bottom of the plat appear the words, "H. H. Reading, Realtor, 6 N. Michigan Boul., Chicago." To the left of this plat are appropriate columns in which appear the dates and amounts of payments as made by plaintiff and credited by defendant from time to time. To the right and adjoining the plat is an appropriate blank evidently designed to be filled out in case the contract is assigned.

The plaintiff testified (and her evidence in this respect is corroborated and not contradicted) that the agent of the defendant solicited the contract of sale on the day prior to its execution, namely, February 10th. She says she met the salesman, Mr. O'Meara, in the office of Attorney Shanasy in the Illinois Merchants Bank building; that at that time she was shown a plat of a proposed subdivision and that the plat was similar to the plat on the back of the contract; that she had not seen the property; that she signed the contract the next day and that this plat was on the back of it when she signed it.

She further says that the first intimation she had that the plat upon the back of the document was different from the plat which had been recorded was about March 1, 1925. She says:

"It lay on a plat with two rectangular curved pieces in the center. I don't know what street it was on. I picked out these particular lots because they were suggested to me by Mr. O'Meara as having speculative value. I do not know whether they were business or residence lots, nor do I know on what streets they were."

The plat which appears on the back of her contract was not recorded. Another plat of the land was prepared having the same name but with the lots and blocks laid out and numbered in a

[illegible][illegible]

that the fact upon the basis of the document was different from

1. I am a white male, 35 years old, 5'10", 170 lbs, with brown hair and blue eyes. I was born in [redacted] and grew up in [redacted]. I have a Bachelor's degree in [redacted] from [redacted] and a Master's degree in [redacted] from [redacted]. I have been married for 10 years and have two children, a son and a daughter, both of whom are currently attending college. I have been employed by [redacted] for the past 15 years and am currently a [redacted]. I have no criminal record and no pending legal issues. I am a member of [redacted] and [redacted]. I have no other information to provide at this time.

not received. Another check of the bank was requested during the

different manner. This second plat was recorded March 4, 1925. A photostatic copy of this plat also appears in the record. It was certified by the Accurate Survey Company on February 11, 1925, and by defendant on February 14, 1925.

Mr. Kettleeson, civil engineer, who prepared this second plat which was recorded, testified that he drew up these plats for E. W. Reading. He says the recorded plat was drawn and completed February 11, 1925, and signed on that date; that he had no blueprints prior to February 11; that it would take him about a day and a half or two days to draw a plat not including the laying out of it; that he went on the subdivision and staked it with the assistance of Mr. Nash.

Mr. Shaney, who was present at the time plaintiff was solicited to make the agreement, testified that he would not say whether the plat shown to plaintiff was a duplicate of the unrecorded plat, but he did say that on the plat exhibited some of the streets ran diagonally across the plat, making a square in the center. He also said the recorded plat was not similar to the one shown plaintiff. Looking at a copy of the recorded plat, he said he would not call any of the streets curved.

Mr. O'Meara, the salesman, testified that at the time of the sale plaintiff and Mr. Shaney picked out three residential lots from his plat which he said was the ~~unrecorded~~ plat. He said:

"I would say it was along about the 15th of February that I got a sales plat to go out and sell property similar to this. I am just guessing at the date. If I recall properly there was one sale from the other plat.*** Some of these contracts were cancelled as soon as the plats were found, but I don't know. That is merely guesswork."

Mr. Reading testified for defendant to the effect that the sales plat subsequently recorded was used only a short interval before February 11, 1925. He said, "I do not remember the number of days, off-hand." He further testified that the value of lots

...this is the only one that was recorded under a name.
A handwritten copy of this list also appears in the record. It
was furnished by the Associate Survey Company on February 11, 1935,
and by telephone on February 14, 1935.
...Mr. Kettleson, with equipment, who prepared this list
and that which was recorded, recalled that he drew up these lists
for W. E. Kettleson. He says the recorded list was drawn and
dated February 11, 1935, and signed on that date; that he had no
recollection prior to February 11; that it would take him about a
day and a half or two days to draw a list not including the listing
out of it; that he went on the expedition and stated it was the
recollection of Mr. Kettleson.
...Mr. Kettleson, who was present at the time this list was
prepared to make the agreement, recalled that he would not say
whether the list shown to Kettleson was a duplicate of the other
or not, but he did say that on the list omitted some of the
items were diagonally across the list, making a square in the con-
text. He also said the recorded list was not similar to the one
shown Kettleson, having a copy of the recorded list, he said
he could not tell why it was drawn.
...Mr. Kettleson, the witness, testified that at the time
of the listing and Mr. Kettleson stated that these witnesses
told him this list which he said was the (Kettleson) list. He said:
"I would say it was about the 10th of February that I
had a sales list to go and sell property similar to this.
I am not positive of the date. It is possible possibly that was
the date when the list was drawn. I am not positive that
recalled as was on the date when I drew it, but I am not
that is what I remember."
...Mr. Kettleson testified the following to the effect that
the sales list subsequently recorded was used only a short distance
before February 11, 1935. He said, "I do not remember the number
of days, etc." He further testified that the value of the

19, 19 and 20 in Block 6 on February 11, 1925, as shown by the unrecorded plat, was about \$30,000, while the value of the same lots as shown by the recorded plat was about \$3,750.

On September 9, 1927, plaintiff wrote defendant demanding a new contract for the lots, which she claimed she had in fact purchased, or a refund of her money.

The defendant contends on the authority of Summers v. Hibbard & Co., 153 Ill. App. 102, that the plat on the back of the contract is not a part of it. That case holds the general rule that the written part of a contract takes precedence over the printed part when it varies from it, but no such question arises here. The name of the subdivision appears in the written body of the contract and, as thus written, it corresponds to and is not inconsistent with the name on the back of the contract describing the subdivision. In fact the same are identical.

Plaintiff contends, citing Read v. Bartlett, 255 Ill. 76; Keenle ex rel. Cameron v. New, 214 Ill. 237; Trustees of Schools v. Schnell, 179 Ill. 504; Piper v. Connally, 108 Ill. 646, that a plat or map referred to in a deed or contract is as much a part thereof as if copied therein. This contract does not in express words make the plat on the back a part of it, but that it is a part of it is an inference from all the facts and circumstances which appear in evidence. If it is not for the purpose of disclosing the location of the property described, why is it there? It is difficult to conceive of any purpose other than it might serve to illustrate the location of property contracted to be sold. Since the language of the contract does not expressly make the plat a part of it, an inference to that effect might be rebutted, but the only evidence tending to rebut it is that of O'Meara, the salesman, and his testimony is quite uncertain and indefinite. As against it, there is the positive testimony of plaintiff, the tes-

timony of Shanesy and the almost conclusive evidence of the surveyor. The sum of the whole matter is that the uncertain evidence of O'Meara, which is inconsistent with the evidence of the plaintiff, Shanesy and the surveyor, cannot overcome the inference which arises from the fact that the plat, purporting to show a subdivision with a name identical with that of the subdivision described in the contract, was used by the parties in making the contract.

We conclude therefore that the finding of the court is directly contrary to the manifest weight of the evidence, and for that reason the judgment is reversed with a finding for the plaintiff of \$2802.69 with interest thereon from September 9, 1927, at the rate of five per cent per annum, amounting to the sum of \$111.33, and making a total of \$2914.02.

REVERSED WITH FINDING OF FACTS AND
JUDGMENT HERE.

O'Connor, P. J., and McGuire, J., concur.

W. J. McGuire

W. J. McGuire

... of Kennedy and the almost conclusive evidence of the surveyor.
The fact is the whole matter is that the evidence is
... which is inconsistent with the evidence of the plaintiff.
... Kennedy and the surveyor, ...
... from the fact that the plaintiff is now a subdivision
... identical with that of the subdivision described in the
... was used by the parties in making the contract.
... Kennedy and the surveyor that the plaintiff is
... to the plaintiff's weight of the evidence, and for
... the judgment is reversed with a finding for the plain-
... of \$5000.00 with interest thereon from September 1, 1907, at
... rate of five per cent per annum, amounting to the sum of
... and costs a total of \$7500.00.

REVEREND FIVE THINGS A THING AND
THAT IS ALL

WITNESSED AT ... A.D. 1908

[Handwritten signature]

32714

FINDING OF FACTS.

We find as facts in this case that on February 11, 1925, the plaintiff, Nell Nell Keespel, made a contract with the defendant for the purchase of Lots 18, 19 and 20 in Block 6 of Calumet Terrace De Luxe, a subdivision of the Southeast quarter of the Northeast quarter (except that part thereof lying Southwest of Michigan City Road) in Section Eleven, Township 36 North, Range 14 East of the Third Principal Meridian, in Cook County, Illinois; that a plat of said Calumet Terrace De Luxe, showing the lots, blocks and streets thereof, appears on the back of said contract and was used by the parties in negotiations leading up to the making of the same and upon the making of the same became a part thereof; that said plat was never recorded but another plat of the same subdivision showing a different location of streets, lots, blocks, etc., was recorded by the defendant in the Recorder's office of Cook County; that thereby the defendant has disabled itself from conveying to the plaintiff the property which she contracted to buy in said contract of February 11, 1925; that after discovering the fact as to the recording of a plat of said subdivision different from that appearing on the back of the contract, on September 9, 1927, plaintiff demanded that defendant either convey the lots which she had actually bought or return the money which she had paid under the contract; that up to that time she had paid to defendant under said contract the sum of \$2052.68, which said sum, with interest thereon from the date of said demand at five per cent per annum, amounting to \$111.36, makes a total sum of \$2214.02, for which plaintiff is entitled to judgment against the defendant.

STATE OF TEXAS.

We find as facts in this case that on February 11, 1920, the plaintiff, Nell Lee Leeper, made a contract with the defendant for the purchase of land in and in Block 6 of Calumet Terrace No. 1, a subdivision of the southeast quarter of the southeast quarter (Section 34 and 35 Township 38 North, Range 14 East of the Third Principal Meridian, in Cook County, Texas) that a plat of said Calumet Terrace No. 1, showing the lots, blocks and streets thereof, appears on the back of said contract and was used by the parties in negotiations leading up to the making of the same and upon the making of the same became a part thereof; that said plat was never recorded but another plat of the same subdivision showing a different location of streets, lots, blocks, etc., was recorded by the defendant in the recorder's office of Cook County; that thereby the defendant has obtained benefit from conveying to the plaintiff the property which she contracted to buy in said contract of February 11, 1920; that after discovering the fact as to the recording of a plat of said subdivision different from that appearing on the back of the contract, on September 9, 1921, plaintiff demanded that defendant either convey the land which she had actually bought or return the money which she had paid under the contract; that as to that time she had paid to defendant under said contract the sum of \$2802.22, which said sum, with interest thereon from the date of said demand of five per cent per annum, amounted to \$311.75, makes a total sum of \$3014.02, for which plaintiff is entitled to judgment against the defendant.

6539 249 T. 649⁴
443 - 32383

WILLIAM A. FURRY,

Appellee,

v.

MICHIGAN CENTRAL RAILROAD
COMPANY, a corporation,

Appellant.

APPEAL FROM

CITY COURT OF

CHICAGO HEIGHTS.

Opinion filed June 27, 1938

MR. PRESIDING JUSTICE HOLCOM delivered the opinion
of the court.

This is an action which involved the application of
the "Federal Employers' Liability Act." The plaintiff was in
the employ of defendant whose railroad was an interstate road,
so that each were at the time the accident occurred, for which
plaintiff seeks damages from defendant, engaged in interstate
commerce.

The declaration consists of two counts, in the first
of which plaintiff charges that on August 2, 1936, defendant was
a common carrier engaged in interstate commerce; that plaintiff
at the time was working for defendant as a crossing repair man,
and that he was riding in the due course of his employment on a
certain power driven car known as a "speeder", and that the
same was driven and operated by other servants of defendant on
its right-of-way in a westerly direction through a part of the
City of Hammond, in the State of Indiana, an interstate highway,
and used in interstate transportation. The speeder was being used
to convey plaintiff and other servants of defendant over its
railroad for the purpose of maintaining and repairing its tracks

2481 849

44-3886

CHIEF, FBI
WASHINGTON, D.C.
JUN 27 1934

Chicago filed June 27, 1934

RE: BREXIDEN THOMAS WILSON delivered the opinion

of the court.

This is an action which involved the question of the "Federal Reserve Bank's" liability for the delivery of defendant's money to an interstate bank. It was held that the defendant was not liable for the delivery of the money to the interstate bank, as the money was not in the possession of the defendant at the time it was delivered.

The defendant consists of two counts, in the first of which plaintiff charges that on August 8, 1933, defendant was a common carrier engaged in interstate commerce; that plaintiff at the time was working for defendant as a crossing watchman, and that he was riding in the bus owned by his employer on a certain power driven car known as a "bus", and that the same was driven and operated by other servants of defendant on the right-of-way in a westerly direction through a part of the City of Chicago, in the State of Illinois, an interstate highway, and used in interstate transportation. The question was being asked in order plaintiff was asked to deliver over the railroad for the purpose of maintaining and repairing the tracks.

at crossings along defendant's interstate highways, which were used by defendant in interstate commerce; that defendant was subject to the Federal Employers' Liability Act; that it was then and there the duty of defendant to exercise ordinary and reasonable care in the management, operation and control of said speeder so as not to injure plaintiff; that defendant failed to exercise such duty, but on the contrary, while plaintiff was riding upon said speeder in due course of his employment, other servants of defendant not regarding their duty in the premises, so carelessly, negligently, wrongfully and improperly drove, managed, operated and controlled said speeder in a westerly direction upon and along said railroad that as a direct and proximate result of such conduct said speeder was caused to and did then and there become derailed, and as a result thereof plaintiff lost one of his legs and was otherwise injured.

The second count avers, after reciting the inducement set forth in the first count, that while plaintiff was riding upon said speeder at said time and place, the other servants of defendant in charge thereof, contrary to their duty, carelessly and negligently failed and neglected to keep a reasonably careful lookout ahead for obstructions upon and along said railroad; that they could then and there in the exercise of ordinary care have discovered the presence of a dog travelling along, upon and across said railroad in time to stop the speeder or to diminish its speed and thereby avoid the accident and the resulting injury to plaintiff; that it failed so to do and so carelessly and negligently operated said speeder without keeping and maintaining a reasonably careful lookout ahead that in consequence thereof said speeder was caused to and did run upon and against the dog, which was then and there upon or near the railroad, and in con-

at a meeting held at the residence of the defendant, which was
held by defendant in intimate conversation; that defendant was
subject to the Federal Highway, liability act; that it was then
and there the duty of defendant to exercise ordinary and reason-
able care in the management, operation and control of said speed-
er as was an injured plaintiff; that defendant failed to exer-
cise such duty, but on the contrary, while plaintiff was riding
upon said speeder in the course of his employment, other persons
of defendant not regarding their duty in the presence, as exer-
cised, negligently, recklessly and intentionally injured, damaged,
operated and controlled said speeder in a wrongful division upon
and along said railroad that as a direct and proximate result of
such conduct said speeder was caused to and did then and there
become derailed, and as a result thereof plaintiff lost one of
his legs and was otherwise injured.

The report of the jury, after viewing the evidence
set forth in the first count, that while plaintiff was riding
upon said speeder at said time and place, the other persons of
defendant in charge thereof, contrary to their duty, negligently
and recklessly failed and neglected to keep a reasonably careful
lookout ahead for obstructions upon and along said railroad; that
they could then and there in the exercise of ordinary care have
discovered the presence of a log travelling along, upon and across
said railroad in time to stop the speeder at or within the
speed and thereby avoid the accident and the resulting injury to
plaintiff; that it failed to do and so negligently and negligently
negligently caused said accident, injury and damages and
recklessly caused plaintiff to be injured and damaged and
said speeder was caused to and did then and there become derailed,
which was then and there upon or near the railroad, and in con-

sequence thereof the speeder became derailed with the resulting injury to plaintiff, as charged in the first count.

Defendant interposed a plea of the general issue.

On the issues thus joined there was a trial before court and jury with a resulting verdict for plaintiff of \$17,500, upon which the court entered a judgment after overruling defendant's motions for a new trial and in arrest of judgment; and defendant brings the record here for review by appeal, and urges for error and argues for reversal that the verdict and judgment are contrary to the weight of the evidence, and the court's denying defendant's motion for a new trial; that plaintiff assumed the risk of the collision and derailment of the speeder and therefore cannot recover damages for his injury; that the court erred in admitting improper evidence, particularly evidence in relation to the hole in the fence; error in the court's giving improper instructions at the request of plaintiff, and likewise refusing to give to the jury certain instructions requested by defendant, including defendant's refused instruction number four; also in permitting counsel for plaintiff to make inflammatory and improper remarks, etc. to the jury; and that the conduct of plaintiff's counsel in repeatedly asking improper questions of witnesses and requiring defendant's counsel to object thereto is reversible error; and lastly that the verdict and judgment are manifestly excessive and the result of passion and prejudice.

Plaintiff assigns cross-errors in the refusal of the court to admit competent, relevant and material evidence offered by plaintiff and in giving all of the instructions asked by defendant.

We will dispose of plaintiff's cross-errors first.

A careful examination of the evidence does not disclose the refusal of the court to admit competent, relevant and material evidence offered by and on behalf of plaintiff. The rulings of the court in this regard were liberal, and we find no just cause for complaint.

As to the second cross-error, the giving by the court of each and all of the instructions offered on behalf of defendant, we would say that instructions are not given on behalf of either party. The instructions given by the court are instructions upon the law of the case, and furthermore plaintiff does not argue all of such instructions or any of them. Therefore such assignment of cross-error is without avail for our review.

In the defendant's reply brief counsel complain that plaintiff has violated in its brief Rules 18 and 19 of this court, in that Rule 18 provides that the abstract will be taken as accurate and sufficient for a full understanding of the questions presented for decision unless the opposite party shall file a further abstract, making necessary corrections or additions, which he may do if he deems it necessary to a full understanding of the merits of the cause. Instead of so doing plaintiff has inserted in his brief alleged references to supposed inconsistencies and omissions in defendant's brief and abstract; and that plaintiff likewise violated Rule 19 in repeatedly quoting alleged important evidence at length from the evidence. These criticisms are well taken, particularly where plaintiff has in more than one instance quoted at length from the record what he terms important evidence, when an examination of the abstract reveals that it contains a fairly abridged statement of all the evidence in conformity with the rule. The exception which defendant's counsel takes to the

A careful examination of the evidence does not disclose the total of the court to admit competent, relevant and material evidence offered by and on behalf of plaintiff. The rulings of the court in this regard were liberal, and we find no just cause for complaint.

As to the second error, the giving by the court of such and all of the instructions offered on behalf of defendant, we would say that instructions are not given on behalf of either party. The instructions given by the court are binding upon the law of the case, and furthermore plaintiff does not argue all of such instructions or any of them. Therefore such statement of error is without avail for our review.

In the defendant's reply brief counsel therein state plaintiff has violated its brief taken in and is of this court. In that brief it is provided that the answer will be taken as admitted and sufficient for a full understanding of the questions presented for decision unless the opposite party shall file a further statement, making necessary questions or admissions. This we say it is not necessary to a full understanding of the facts of the case. Instead of so doing plaintiff has inserted in its brief alleged references to numerous testimonies and omissions in defendant's brief and answer; and that plaintiff likewise violated rule 10 in repeatedly quoting alleged important evidence at length from the evidence. These violations are well taken, particularly where plaintiff has in more than one instance quoted at length from the record what he claims important evidence. When an examination of the record reveals that it contains fairly amended statement of all the evidence in conformity with the rule, the exception which defendant's counsel takes to the

repeated statement in plaintiff's brief that "many material facts are omitted" and "their statement is a one-sided, partial presentation of the evidence", etc., is well taken as such repeated statements of plaintiff's counsel are entirely gratuitous and find no support in the record.

It is the burden of plaintiff to sustain the material averments of his declaration that the accident to him was caused by the careless, wrongful and improper manner in which the servants of defendants drove, managed, operated and controlled the speeder at the time of the accident, and that the accident was the direct, proximate result of such improper management by the servants of defendant causing the derailment of the speeder and the injuries to plaintiff, as in the first count charged, and also as charged in the second count, that the servants in charge of the speeder could by the exercise of ordinary care have discovered the presence of the dog travelling along and across the railroad in time to have stopped said speeder, or to have diminished its speed and thereby avoided the accident and injury to plaintiff, and that the servants of defendant not regarding their duty, carelessly and negligently operated said speeder upon and along the railroad without keeping and maintaining a reasonably careful lookout ahead, and that in consequence of said negligence said speeder was caused to and did run upon and against the dog, which was then and there upon or near said railroad, and in consequence thereof said speeder was caused to and did become derailed resulting in the injuries suffered by the plaintiff. This is the burden of plaintiff's proof made necessary by the averments of his declaration and is the measure of defendant's duty and responsibility under the Federal Employers' Liability Act.

From the evidence we gather the following facts:

requested statement in Plaintiff's brief that "any material facts are omitted" and "that statement is a one-sided, partial statement of the evidence", etc., is well taken as such requested statement of Plaintiff's counsel are entirely untrue and that no support in the record.

It is the burden of Plaintiff to establish the negligence of his decedent that the accident to him was caused by the careless, wrongful and improper manner in which the operation of defendant's drive, managed, operated and controlled the accident at the time of the accident, and that the accident was the direct, proximate result of such improper management by the defendant of defendant causing the defendant of the accident and the injuries to Plaintiff, as in the first count charged, and also as charged in the second count, that the accident is charged of the accident caused by the exercise of ordinary care have discovered the presence of the dog traveling along and across the railroad in time to have stopped said accident, or to have obtained the speed and thereby avoided the accident and injury to Plaintiff, and that the negligence of defendant not regarding their duty, negligently and willfully caused said accident and injury along the railroad without keeping and maintaining a reasonably careful lookout ahead, and that in consequence of said negligence said accident was caused to and did run upon and against the dog which was then and there upon or near said railroad, and in consequence thereof said accident was caused to and did become liable resulting in the injuries suffered by the Plaintiff. This is the burden of Plaintiff's proof and necessary by the average of his decedent and is the measure of defendant's duty and responsibility under the Federal Employers' Liability Act. From the evidence on either the following facts:

That in the neighborhood of 8 o'clock A. M. on August 2, 1926, plaintiff with five other section laborers in the employ of defendant, among whom was one Mursey, the gang foreman, was riding in a westerly direction on a gasoline motor, or as it is colloquially called, a "speeder", upon and along defendant's west bound main track about 800 feet east of Columbia avenue, in the City of Hammond, when a small dog about 18 inches high crawled through a hole in the fence paralleling said track, and jumped or ran about eight feet to the track, was struck by the speeder derailing it, throwing plaintiff beneath one of its wheels and so injuring his right leg that it had to be and was amputated about two inches above the knee; that this section gang left Tolleston, Indiana, about seven o'clock in the morning on the speeder for the purpose of repairing a crossing at Hammond, Tolleston being about 7 miles east of Hammond; that the tools used consisting of picks, shovels, bars, etc., were carried on the speeder, lying loosely in troughs on either side of the elevated seat in the speeder; the speeder was 7 feet long and 4 feet 5 inches wide over all; the seat which was elevated above the floor of the speeder was 2 feet 2 inches wide and 6 feet 4 inches long; the seat was 2 feet 10 inches above the top of the rail; the troughs on either side at the base of the seat were 15 inches wide; the brake rod extended above the top of the seat about 2 feet and was located about a foot and a half to 2 - inches from the front end of the car in which was a large bell; hanging down from the rod, near the bell, was a spike, which was used to strike the bell as a warning signal; such striking made a loud noise, which could be heard a considerable distance; the speeder in travelling made much noise due to the rattling of the tools, the whir of wheels, and the chug chug noise of the gasoline speeder; as the

speeder moved in a westerly direction plaintiff sat in front on the left side, with his back to the north, his feet hanging over the seat towards the south and his head and body turned toward the west; across from him on the right hand side of the car sat Harry Swen, with his back towards plaintiff, sitting in about the same position as plaintiff; behind plaintiff on the left hand side, was the foreman Hursey, who operated the speeder; back of him was Jesus Martinez, a Mexican; back of Swen on the right of the speeder was Pablo Hernandez, a Mexican, and on the rear right side of the speeder was Joe Mara, a third Mexican; plaintiff from his position on the seat could easily reach the spike used to strike the gong and he could also reach the brake rod used to control the movement of the speeder; plaintiff knew how to operate the speeder and stop it with the brake lever; that he could have shifted the lever to the east and stopped the speeder; that after leaving Tolleston at 7 o'clock in the morning the speeder first stopped at a place called Gibson, where it was lifted over a derail; about 1000 feet west of that point it was again stopped and lifted over another derail; each of these operations delayed the men about two minutes; there were no other stops until the accident occurred, about 8 o'clock that morning; about 1500 feet east of Columbia avenue and 700 feet east of the point of derailment is the west end of a curve in defendant's west bound main track; on the west side of that curve, extending to the east side of Columbia Avenue, the track is straight; there was a wire fence 8 feet north of defendant's west bound track, which paralleled the tracks for a long distance; the fence is about 6 feet high and immediately north of the fence at the time of the accident were grass and weeds from 33 inches to 4 feet high, which extended north for some distance to Logan street, east and west from

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the point of derailment; all of the occupants of the speeder at the time of the accident in question, except the three Mexicans, testified at the trial; while the speeder moved west on the straight track, after rounding the curve, it was travelling about 15 or 20 miles an hour; plaintiff, foreman Mursey, and Swen were all looking ahead during the time the speeder approached the scene of the accident; when it was about 200 feet east of Columbia avenue, the dog, which caused the derailment, crawled through the wire fence heretofore described, jumped or ran upon the track when the speeder was from 4 to 10 feet east of the dog and before any of the occupants of the speeder could stop the speeder it struck the dog and was derailed, as a result of which derailment plaintiff was thrown from the speeder and his right leg crushed; an ambulance was called and he was taken, within 10 or 15 minutes of the time of the accident, to St. Margaret's Hospital in Hammond, where his leg was amputated; he was confined to the hospital for 13 weeks; the stump was healed but somewhat sore and so remained for two or three months thereafter; prior to the accident plaintiff had been in the employ of defendant as crossing watchman and section hand about three years prior thereto he had performed the same kind of work for the N. J. & E. Railway Company at Hammond, and for 20 years before the accident he had many different jobs of the laboring character not steady but "just odds and ends"; plaintiff had ridden on the same speeder back and forth past the point of derailment practically every day for at least two months before the accident; during that time dogs were in the habit of running along Logan street chasing automobiles and running after speeders on which plaintiff was riding; that plaintiff knew there was a hole in the wire fence as he had seen it many times before the accident; he was also chargeable with knowledge that if dogs got out on

the point of departure; all of the occupants of the car
at the time of the accident in question, except the three men
known, testified at the trial; while the accident report on
the accident, after reaching the office, it was travelling
about 15 or 20 miles an hour; Plaintiff, for some reason, and
even were all looking ahead during the time the accident happened
of the scene of the accident; when it was about 200 feet west
of Columbia Avenue, the dog, which caused the accident, jumped
through the wire fence described, jumped over the fence
the track when the accident was from 4 to 10 feet west of the
dog and before any of the occupants of the car could stop
the accident it struck the dog and was killed, as a result of
which Plaintiff Plaintiff was thrown from the car and his
right leg crushed; an ambulance was called and he was taken
within 10 or 15 minutes of the time of the accident to St. Mary's
Hospital in Kansas, where his leg was amputated; he
was confined to the hospital for 13 weeks; the knee was healed
but somewhat sore and he remained for two or three months there-
after; prior to the accident Plaintiff had been in the employ of
defendant as crossing watchman and section hand about three years
prior thereto he had performed the same kind of work for the
A. & K. Railway Company at Kansas, and for 30 years before the
accident he had many different jobs of the same character
not exactly but "just about the same"; Plaintiff had ridden on the
same railroad for many years and had been on the same train
many times; every day for at least ten months before the accident;
that the dogs were in the habit of running along beside
Plaintiff was riding; that Plaintiff knew there was a hole in
the wire fence as he had seen it many times before the accident;
he was of no particular size knowledge that it was not out on

the railroad track they might be struck by a speeder and that if the speeder was going fast enough it would be derailed; that such speeder travelled at and near the point of the accident usually at the rate of about 30 miles an hour, sometimes slower, sometimes faster.

Plaintiff testified that when the speeder was 250 feet east of the point of derailment running about 35 miles an hour, he saw the offending dog jump on the track, whereupon he hollered "look out for the dog"; that he then turned around and looked back and saw Bursay standing up and looking back; that plaintiff did not do anything else as the speeder approached the dog, but looked towards the dog; when the speeder was about 100 feet east of the dog, plaintiff again hollered "look out for the dog"; that when the speeder hit the dog it left the rail and went a distance of 6 or 8 feet; that when plaintiff first saw the dog it was probably 18 or 20 inches north of the north rail; between the time of the first shout and the time of the second shout he did not make any effort to get hold of the brake on the car.

It appears that four days after the accident an employee of defendant, Harry E. Folk, a court reporter, interviewed plaintiff in the hospital at Hammond; that plaintiff stated in substance to such reporter that at the time of the accident the dog came right through the right-of-way fence and jumped right up on the rail; and the speeder was derailed; that the speeder was not running very fast; that he had no idea of the speed; he first saw the dog when he saw its head coming right through the fence and he commenced hollering at the dog trying to get him back when he was coming up on the track; when he first saw the dog plaintiff was 8 or 10 feet from him and the dog was

then coming through the fence; that plaintiff did not think the dog was going to get through the hole; that it was about all the dog could do to get through the hole; that plaintiff did not think the dog was coming on the track, but thought the dog might run alongside of it; that the dog was a pretty fair sized dog; that plaintiff did not see the dog before the dog came through the fence; that on previous occasions when plaintiff moved over the track at the point of the accident he noticed the dog on Logan street, but the dog would never come right up on the right of way; he would come and run along Logan street, and that he never saw any dogs come right up on the railroad, but there were three or four down there that would chase motors, automobiles and other vehicles along the street; that on several previous occasions the offending dog would run along and chase the speeder upon which plaintiff was riding, but he never came through the wire fence; that foreman Hursey was operating the speeder in a careful and proper manner; that he would throw on the "juice" and then shut it off so that the speeder would not get up high speed; that Hursey always did that whenever he was in a town, but that the speeder was running slowly because if it had been running the regular speed like they generally do "shooting in the juice" the "whole bunch" would have been killed; and that the speeder was not more than 8 feet from the hole when the dog came through and jumped right up on the track just as the wheels caught him; that the speeder was not running ahead of a west bound train, and that the speeder had plenty of time; that he had no idea as to the size of the hole the dog came through; that it looked to him as though the dog had some trouble getting through the hole; he had to crowd himself in order to crawl through; that plaintiff did not see the dog until he was coming through the fence, but that

then coming through the fence; that plainly did not think the
dog was going to get through the hole; that it was about all the
dog could do to get through the hole; that plainly did not
think the dog was coming on the track, but thought the dog might
run alongside of it; that the dog was a pretty fair sized dog;
that plainly did not see the dog before the dog came through
the fence; that on previous occasions when plainly moved over
the street at the point of the road he noticed the dog on
Lodge street, but the dog would never come right up on the right
of way; he would come and run along Lodge street, and then he
never saw any dogs come right up on the sidewalk, but there were
many of them that would come right up on the sidewalk, and then he
other vehicles along the street; that on several previous occasions
when the sidewalk was closed and when the speaker was
which plainly did not think, but he never came through the wire
fence; that because the speaker was speaking the speaker in a very
loud and proper manner; that he would throw on the "fence" and
then that is all he said the speaker would not get up high enough;
that because always did that whenever he was in a town, but that
the speaker was running slowly because it is not been running the
regular speed like they usually do "because in the hole";
the "whole town" would have been killed; and that the speaker was
not more than 5 feet from the hole when the dog came through and
jumped right up on the track just as the speaker caught him; that
the speaker was not running ahead of a west bound train, and that
the speaker had plenty of time; that he had no idea as to the
size of the hole the dog came through; that it looked to him as
though the dog had some trouble getting through the hole; he had
to press himself in order to crawl through; that plainly did
not see the dog until he was coming through the fence, and that

plaintiff understood that the man who took his testimony was a stenographer, and was taking down a record of what was said, and that what plaintiff said was true.

It developed on cross examination of Hursey, the fore man operating the speeder, that there was a passenger train C&N in Hammond at 7:36, and that on the morning of the accident it was late; that he knew how late the train was, and that he was not in any more of a hurry that morning than generally; that he was not concerned about the train catching up with him; that Hursey looked back as well as forward in running the speeder; that if the train had been close he would have waited until it went through; that he kept looking back because other trains might be coming; while there were no regular trains due there might be extra trains. Hursey also testified that the three Mexicans who were riding on the speeder had left the employ of defendant, and that he had no knowledge as to where they were, or where any of them were at the time of the trial. (This was the reason assigned for not producing these Mexicans as witnesses.)

Hursey also testified that plaintiff from his position on the speeder the morning of the accident could have shifted the brake to the east and stopped the speeder.

Plaintiff argues that because Hursey, defendant's fore man, was looking backwards so that he might observe whether the passenger train past due was overtaking him, was an act of negligence, but this is not logical. It was just as necessary for the safe operation of the speeder that Hursey should look backward as well as forward, knowing that he might be overtaken by the past due passenger train, or by some other special train, the schedule of which he had no knowledge; that it was just as necessary in the exercise of due care in the operation of the speeder

that Hursey should look to the rear for obstacles as well as to look forward, and the evidence demonstrates that he did both; and the evidence further demonstrates that Hursey from the time he first knew of the presence of the dog was not able to stop the speeder, in the exercise of reasonable care, in time to avoid striking the dog, and that Hursey from the time he first saw the dog used his best efforts to stop his speeder in an attempt to avoid, if possible, hitting the dog and derailing the speeder, and there is no evidence of a convincing character that Hursey did not, from the time he first observed the dog, use his best efforts to avoid striking it. This is but a reasonable deduction from the evidence, because Hursey's life and limb were just as much in jeopardy as plaintiff's, as well as the rest of the men on the speeder if the dog was struck, for it seems to be the general consensus of opinion of the witnesses testifying, that the speeder was of such construction that striking an object like a dog would necessarily result in its derailment.

It is argued by plaintiff that proof should have been received that the hole in the fence through which the dog crawled had existed prior to the accident, so that the driver of the speeder might reasonably expect that dogs or other animals might be on or near the defendant's track at the place of the accident.

We think it unreasonable to expect that the driver of a speeder could in operating the same observe small holes through which a dog might crawl on to the right-of-way and impede or interfere with the progress of the speeder. It stands to reason that such a hole could not readily be observed by one operating a vehicle running at a speed in excess of 35 miles an hour upon a clear road, which seems to have been the minimum speed of the

that Murray should look to the rear for obstacles as well as to look forward, and the evidence demonstrates that he did both; and the witness further testifies that Murray from the time he first took of the presence of the dog was not able to stop the speaker, in the exercise of reasonable care, in time to avoid striking the dog, and that Murray from the time he first saw the dog used his best efforts to stop his speaker in an attempt to avoid it, striking the dog and sustaining the injuries, and there is no evidence of a convincing character that Murray did not, from the time he first observed the dog, use his best efforts to avoid striking it. There is but a reasonable deduction from the evidence, because Murray's life and limb were just as much in jeopardy as Plaintiff's, as well as the rest of the car as the speaker if the dog was struck, for it seems to be the general consensus of opinion of the witnesses testifying, that the speaker was at such a position that striking an object like a dog would necessarily result in the defendant.

It is argued by Plaintiff that there should have been received that the hole in the fence through which the dog entered had existed prior to the accident, so that the driver of the speaker might reasonably expect that dog or other animals might be on or near the defendant's track at the place of the accident. To which it is responsive to expect that the driver of a speaker would in operating the same observe well ahead of him which a dog might enter on to the right-of-way and impact on him serious with the progress of the speaker. It stands to reason that such a hole could not readily be observed by one operating a vehicle traveling at a speed in excess of 25 miles an hour upon a clear road, which seems to have been the minimum speed of the

speeder when running in the ordinary way. It stands to reason that if it was the duty of defendant's drivers of speeders to take notice of every hole in the woven wire fence alongside of defendant's track, the practical operation of such speeders would be impossible. There is no claim here that defendant's servant Hursey was guilty of negligence in running said speeder at an excessive rate of speed, and as held in Bundy v. Litchfield & Madison Ry. Co., 190 Ill. App. 363, which seems to be quite in point:

"In an action to recover for personal injuries sustained by plaintiff while riding on a railroad motor car as a result of the car being derailed by striking a dog, where the evidence tended to show that the dog jumped suddenly on the track in front of the car and was struck before there was time to check the speed of the car, a verdict for plaintiff held manifestly against the weight of the evidence."

It is apparent that the accident in the instant case was caused by the dog suddenly appearing before there was time, in the exercise of due care, for the driver of the speeder to check the speed of the car sufficiently to avoid the impact with the animal which resulted in the derailment of the speeder and the injuries to plaintiff.

We ground our conclusions in this case on the fact that the testimony in this record fails to support the charges of negligence contained in plaintiff's declaration; that there is no evidence before us from which in reason it can be held that Hursey was guilty of any negligence in the operation of the speeder, which was the proximate cause of the derailling of the speeder and plaintiff's resulting injuries. The negligence of defendant which would entitle plaintiff to recover must be such negligence as is

...the fact that the defendant was driving at a speed of 40 miles per hour at the time of the accident. The defendant was also driving at a speed of 40 miles per hour at the time of the accident. The defendant was also driving at a speed of 40 miles per hour at the time of the accident.

1. The first step in the process of the investigation is the identification of the problem. This is done by the investigator who is assigned to the case. The investigator will then gather information about the problem and the people involved. This information will be used to determine the cause of the problem and to develop a plan to solve it.

It is apparent that the accident in the instant case was caused by the dog suddenly appearing before the car, in the exercise of the care, for the driver of the vehicle to check the speed of the car sufficiently to avoid the impact with the animal which resulted in the termination of the operator and

[illegible]

charged in each count of plaintiff's declaration and such negligence must be proven by a preponderance of the evidence, in order to fix a liability for plaintiff's injuries upon the defendant under the charges contained in the declaration, and which are necessary to be proven to make the defendant liable under the Federal Employers' Liability Act. The averments of negligence in the declaration are such as defendant must be guilty of before plaintiff is entitled to recover. The averments of the declaration of such acts of negligence, of which the defendant is alleged to be guilty, must be proven before a recovery can be had under the Federal Employers' Liability Act. Thus holding, it is not necessary for this court to pass upon the other errors assigned and argued.

For the foregoing reasons the judgment of the City Court of Chicago Heights is reversed and the cause is remanded to that court for a new trial consistent with the views in this opinion expressed.

REVERSED AND REMANDED.

TAYLOR AND WILSON, JJ. , CONCUR.

entirely in view of the fact that the defendant's conduct was such as to
indicate that he was not a person of ordinary intelligence. It
ought to be a liability for the defendant's conduct when the
defendant makes the charges contained in the indictment, and
which are necessary to be proven to make the defendant liable
under the Federal Statute, liability for. The defendant's
negligence in the dedication and such as defendant must be
guilty of before plaintiff is entitled to recover. The recovery
of the defendant of such sums of negligence, of which the
defendant is alleged to be guilty, must be proven before a
verdict can be had under the Federal Statute, liability for.
This holding, it is not necessary for this court to pass upon
the other errors assigned and argued.

For the foregoing reasons the judgment of the City
Court of Chicago Heights is reversed and the cause is remanded
to that court for a new trial consistent with the views in this
opinion expressed.
REVEREND AND HONORABLE

JAMES A. HARRIS, JR., JUDGE.

249 I.A. 650

30758

S. W. STRAUS & CO.,
a corporation,

Complainant and Appellee,

v.

EMANUEL STERN and JOSEPH
ROSENBERG,

Defendants.

APPEAL FROM

INTERLOCUTORY ORDER

CIRCUIT COURT.

On Appeal of
JOSEPH ROSENBERG,
Appellant.

Opinion filed June 27, 1928

MR. PRESIDING JUSTICE HOLDEN delivered the opinion
of the court.

Complainant filed its bill herein against the defendants Emanuel Stern and Joseph Rosenberg, in which it alleged inter alia that on to-wit: April 2, 1928, defendant Emanuel Stern purchased from complainant ten bonds, known as Canrig Port and Waterways Bonds, of the denomination of \$1000 each, at the price of \$885 per bond, plus accrued interest and brokerage, the interest thereon to the date of sale being \$187.78 and the brokerage \$20, and that the total amount payable for said bonds was \$8027.78; that the sale was made for cash, no credit was extended to defendant Stern; that payment therefor should have been made by defendant Stern concurrently with the delivery of the bonds; that said bonds were sent by a messenger to defendant Stern's place of business, and not finding him in his office the messenger erroneously and without authority from complainant so to do, left the bonds with an employee of Stern; that such employee thereafter delivered the bonds to Stern, informing him

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Opinion filed June 27, 1938

of the court

Complaint filed in this case against the defendant
with several other and Joseph Rosenberg, in which it alleged
that this was an act of fraud, defendant Rosenberg being
charged with conspiracy to defraud, from an honest debt and
conspiracy to defraud, of the defendant of \$1000 each, at the time
of 1935 per bond, also charged interest and damages, the law
remains known to the date of sale being \$100.75 and the proceeds
\$100.75, and that the total amount payable for said bonds was
\$100.75; that the sale was made for cash, no credit was given
and no defendant there; that against Rosenberg should have been
made by defendant from conspiracy with the delivery of the
bonds; that said bonds were sent by a messenger to defendant
Rosenberg's place of business, and not finding him in his office the
messenger immediately and without authority from defendant as
to be, left the bonds with an employee of Rosenberg; that such em-
ployee thereafter delivered the bonds to Rosenberg, informing him

at the same time that they had been delivered by a messenger of complainant, and that said defendant Stern well knew that the sale of these bonds was for cash and that he was not entitled to receive the same or to become the owner thereof until he had made payment therefor to complainant; that on April 4, 5, 6, and 7, 1938, complainant demanded payment of the said bonds from the defendant Stern or the return of the same, informing said Stern that the requirement of cash payment for said bonds had not been waived, but that the bonds had been deposited with Stern without the requirement of payment by mistake; that the defendant Stern, after receiving said bonds, and well knowing that he was not entitled to receive the same or take title there- to until he had paid therefor, consulted the defendant Joseph Rosenberg, a lawyer in Chicago, and asked his advice as to what he should do with the same; that Rosenberg advised Stern to re- turn the bonds, but he disregarded such advice, and with intent to defraud complainant did fraudulently and wrongfully convert the bonds to his own use and did sell the bonds to another per- son to complainant unknown for the sum of \$9100; that thereafter said Stern "being uneasy of conscience" did take the proceeds of the sale thereof and delivered it into the possession of de- fendant Rosenberg, and that said Rosenberg at the time of the filing of the bill had said \$9100 in his possession; that com- plainant demanded of Rosenberg that he pay to it the said pur- chase price of the bonds \$9100, but Rosenberg refused so to do claiming that other creditors of defendant Stern were threatening criminal prosecution of said Stern, and that in order to prevent such criminal prosecution defendants might find it necessary to pay such other creditors said sum of money, and further claiming that the erroneous deposit of the bonds by the messenger of com- plainant in the office of said Stern constituted a waiver of

at the same time that they had been delivered by a messenger
of complaint, and that said defendant then well knew that the
sale of these bonds was for cash and that he was not entitled to
receive the same or to become the owner thereof until he had
made payment therefor to complainant; that on April 6, 1932,
and 7, 1932, complainant demanded payment of the said bonds
from the defendant upon the return of the same, indicating
said claim that the requirement of cash payment for said bonds
had not been received, but that the bonds had been deposited with
him without the requirement of payment by cash, and that the
defendant thereupon, after receiving said bonds, and well knowing
that he was not entitled to receive the same or take title there-
to until he had paid therefor, converted the defendant's bonds
into cash, a lawyer in Chicago, and asked his advice as to what
he should do with the same; that defendant advised them to re-
turn the bonds, but he disregarded such advice, and with intent
to defraud complainant did fraudulently and wrongfully convert
the bonds to his own use and did sell the bonds to another per-
son to complainant unknown for the sum of \$10,000; that thereafter
said third party made a check of \$10,000 and took the proceeds
of the sale thereof and delivered it into the possession of the
defendant, and that said defendant at the time of the
saying of the bill had said \$10,000 in his possession; that com-
plainant demanded of defendant that he pay to it the said sum
of \$10,000, but defendant refused to do so
claiming that other evidence of defendant's title was sufficient
to entitle him to said bonds, and that in order to prevent
such criminal prosecution defendant might find it necessary to
pay such other creditors with sum of money, and further claiming
that the amount deposited of the bonds by the messenger of com-
plaint in the office of said third party constituted a waiver of

the requirement of cash payment.

Complainant represented in said bill that it had no adequate remedy at law for the recovery of said money and that the payment of the purchase price of said bonds to other creditors of defendant Stern by defendant Rosenberg would work irreparable injury to complainant, and further avers that by reason of the foregoing facts the sale of said bonds by defendant Stern was an unlawful, fraudulent and illegal conversion of the property of complainant and that the proceeds of the sale belong to complainant, and that the proceeds of said sale being in the possession and custody of defendant Rosenberg should be impressed with a trust in favor of complainant, and that defendant Rosenberg should be decreed to hold said \$9100 for complainant, and should be ordered and directed by the court to pay the same to complainant, and that a temporary injunction issue restraining and enjoining the said Stern and Rosenberg from paying all or any portion of the proceeds of the sale of said bonds to any other person, firm or corporation than complainant; that the injunction prayed for issue without notice to defendants.

It appears that the injunction writ was served on the defendants although neither the writ nor the return thereon appears in the record or the abstract.

In this court complainant heretofore made its motion to dissolve the appeal from the order of the Circuit Court granting the temporary injunction without notice on the ground that before the injunction writ was served the said Rosenberg had paid the proceeds of the sale of said bonds coming to his possession to a person other than complainant on April 9, 1929, and that the act which the said injunction sought restrain having been perform

Complainant represented in said bill that it had no adequate remedy at law for the recovery of said money and that the payment of the purchase price of said bonds in other manner was at defendant's peril by defendant's wrongful conduct. It is the finding of the court that the payment of the purchase price of said bonds in other manner was at defendant's peril by defendant's wrongful conduct, and that the proceeds of said sale being in the possession and custody of defendant's attorney should be returned to him with a trust in favor of complainant, and that defendant's attorney should be decreed to hold said \$2500 for complainant, and should be ordered and directed by the court to pay the same to complainant, and that a temporary injunction issue restraining him and enjoining the said firm and attorneys from paying all or any portion of the proceeds of the sale of said bonds to any other person, firm or corporation than complainant; that the injunction prayed for issue without notice to defendant.

It appears that the information will not be used as the
information although neither the wife nor the return thereon

[illegible]

prior to the service of the injunction writ, the injunction was ineffective and that the appeal consequently involved only a moot question, and should not have been prosecuted by the defendant Rosenberg.

To sustain this motion an affidavit of one Morris A. Rosenthal, an attorney associated with the solicitors for complainant, was filed, in which he deposes that on April 11, 1928 he brought the writ of injunction issued in the cause to the defendant Rosenberg, and that Rosenberg then and there advised him that he, Rosenberg, had already paid to a person other than complainant the proceeds of the sale of the Danzig Port and Waterways Bonds, referred to in the bill of complaint, prior to the entry of the said injunctive order and the issue of said injunctive writ. Such proceedings were had on said motion that it was reserved to the final hearing of the cause.

The defendant Rosenberg filed counter-suggestions in opposition to the granting of the motion to dismiss.

The cause was argued orally and on that argument counsel making the argument for defendant Rosenberg admitted the truth of the statement in the Rosenthal affidavit that the money paid for the bonds had been turned over to Rosenberg and by him paid to persons other than complainant. It was on such argument admitted that the matter involved in this appeal was a moot question, and in support of such contention Wick v. Chicago Telephone Company, 277 Ill. 318, was cited as a sustaining authority. The Wick case seems to be decisive of the moot question here involved and the method pursued by complainant to bring the case to the attention of the court and apply for the dismissal of the appeal for that reason.

prior to the service of the injunction writ, the information was investigative and that the appeal consequently involved only a moot question, and should not have been presented by the defendant Rosenberg.

To maintain this action on behalf of one Morris A. Rosenberg, an attorney associated with the solicitors for defendant, was filed, in which he alleges that on April 11, 1938 he brought the writ of injunction issued in the cause of the defendant Rosenberg, and that Rosenberg then and there advised him that he, Rosenberg, had already said to a person other than complainant the proceeds of the sale of the Bank of America and Company Bonds, referred to in the bill of complaint, prior to the entry of the said injunction order and the issue of said injunctive writ. Such proceedings were had on said motion that it was reserved to the final hearing of the cause. The defendant Rosenberg filed counter-petitions in opposition to the granting of the motion to dissolve.

The cause was argued orally and on that argument counsel making the argument for defendant Rosenberg admitted the truth of the statement in the defendant's affidavit that the money paid for the bonds had been turned over to Rosenberg and by him paid to various other than complainant. It was on such argument admitted that the matter involved in this appeal was a moot question, and in support of such contention King v. Chicago Telephone Company, 277 Ill. 515, was cited as a controlling authority. The said case seems to be decisive of the moot question here involved and the matter presented by complainant and to bring the case to the attention of the court and reply for the dismissal of the appeal for that reason.

The Wick case was a petition for mandamus to compel the Telephone Company to reinstall a telephone which it had removed from the petitioner's premises, and the court stated inter alia:

"In the Appellate Court * * * defendant in error entered a motion to dismiss the appeal and supported the same with suggestions and two affidavits. One affidavit was made by the janitor of the building known as No. 3741 Indiana Avenue, and the other by a real estate broker who attended to the renting of the place. From these affidavits it appears that subsequent to the decision of the superior court the plaintiff in error moved from said apartment 3 and was not living there. Counter-suggestions in opposition to the motion were filed by plaintiff in error which did not deny the facts set up in the affidavits but challenged their sufficiency.

It is urged * * * that the Appellate Court erred in dismissing the appeal because the facts set up in the affidavits were outside of the record and had occurred after the rendition of the judgment in the superior court, and that such facts could not properly be considered as operating as a release of errors unless they had been specifically pleaded as such release. That general rule had been announced in Moore v. Williams, 132 Ill. 591. The facts set up in the affidavits do not technically constitute a release of errors. They simply amount to an abandonment or a loss of a right of action. The record evidence in the case showed clearly that plaintiff in error was not an owner of the premises but was a tenant, - a mere lessee. The affidavits also clearly disclose that she has moved away from the premises and is no longer a tenant or an occupant of the premises, and therefore is no longer entitled to the relief sought by her petition. "

And continuing the court said:

"An appeal may be properly dismissed on a proper showing by affidavits. This court held in Libert v. Beady, 113 Ill. 316, that a suit should be dismissed upon a suggestion or affidavit being filed that the same is fictitious, after the appealing party has been given an opportunity to answer the suggestions or affidavit and has failed to do so. The existence of an actual controversy is an essential requisite to an appellate jurisdiction, and a reviewing court will dismiss an appeal or writ of error where facts are disclosed which show that such a controversy does not exist, even though such facts do not appear in the record. It is the general rule that when a reviewing court has notice of facts which show that only moot questions or mere abstract propositions are involved it will dismiss the appeal or writ of error. Reely v. Ophir Mill Mining Co., 189 Fed. Rep. 601; Butler v. Eaton, 141 U. S. 340; Hard v. Alsop, 100 Tenn. 319; 46 S. E. Rep. 572; Kimball v. Kimball, 174 U. S. 152; 19 Sup. Ct. 539; 3 Corpus Juris, secs. 112, 113, p. 357."

It would seem that Rosenberg should not have prosecuted this appeal. He made no appearance in the trial court nor any motion to dissolve the injunction or to dismiss the suit as he might have done. He can procure no relief in this court that he could not have readily obtained in the trial court. We think it was improvident of him to prosecute this appeal.

As it is conceded by all the parties that the question in this appeal is moot, the motion of the appellee complainant to dismiss will be allowed, and it is ordered that the appeal be dismissed on the motion of complainant.

APPEAL DISMISSED

TAYLOR AND GILSON, JJ. CONCUR.

It would seem that Rosenberg should not have been
cluded this appeal. He made no appearance in the trial court
nor any action to dissolve the injunction or to dismiss the
bill as it came before him. He was present on trial in this
court that he would not have readily admitted in the trial court.
We think it was imprudent of him to withdraw this appeal.
As it is conceded by all the parties that the ques-
tion in this appeal is moot, the motion of the appellee for
dismissal to dissolve will be allowed, and it is ordered that the
appeal be dismissed on the motion of complainant.

WILLIAM H. HARRISON

WILLIAM H. HARRISON, JR., CLERK

452 - 32393

W. L. THORNE,

Appellee,

v.

THE VILLAGE OF DES PLAINES,
a Municipal Corporation,

Appellant.

249 I.A. 650²

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

Opinion filed June 27, 1928

MR. JUSTICE WILSON delivered the opinion of the court.

The plaintiff Thorne filed his suit in the Circuit Court, against the defendant The Village of Des Plaines, for services performed and material furnished under a certain contract in writing, dated March 30, 1921, and recovered a judgment for \$10,814.50, and it is from this judgment that this appeal is perfected.

The contract in question provided that the plaintiff was to furnish all necessary machinery, tools, apparatus and labor for the construction of a well for the defendant, at or near the intersection of Ashland avenue and Desplaines avenue, such location to be more particularly designated by Allen, engineer for said defendant village. Certain specifications attached to said contract were made a part thereof. The contract further provided that the well was to be equipped with a pipe of 18 inch outside diameter to refusal, estimated at 150 feet below the surface. From this point plaintiff was to continue drilling a 18 inch well to a depth of 400 feet and, inserting therein 18 inch inside diameter casing. From this point drilling was to continue so that the well was to be 18 inches to a

distance sufficient to pass through the St. Peters Sandstone, as estimated to be 800 feet below the surface, - throughout which distance a pipe of 10 inches inside diameter casing was to be inserted and, from that point, he was to continue drilling a 10 inch well with an 8 inch inside diameter casing, and proceed in accordance with the specifications.

The contract provided further that no claim for extra work or material should be allowed unless agreed to between the parties and ordered in writing by the engineer; it further provided that an interpretation of the specifications and the terms and conditions of the contract, as to the manner of constructing said well and the kind of material to be used, should be subject to the decision of the engineer in charge and that the parties should abide by his decision.

Provided further that, in case of a disagreement between the parties, the language and provisions of the agreement should prevail. The specifications provided the manner in which the bids should be submitted, the giving of a check by the bidder to insure faithful performance; provided that the work should be done under the direction of the engineer and completed to his satisfaction, subject to the approval of the Board of Trustees.

The most important clause in the specifications and the one upon which the case in question turns, is section 8, which provides that the work should consist of drilling a water supply well at a point designated, the upper 400 feet to be constructed with an inside diameter of 16 inches and, below this depth, constructed to such diameter as the contractors shall elect so as to give a net diameter of not less than 8 inches at the bottom.

Information will be sent to you through the US Postal Service.

The writer has received letters from the following:

Provided further that, in case of a disagreement

no additional copies of this document were sent

And provided further:

"It shall be drilled to a depth sufficient to penetrate the water bearing stratum known as 'Potsdam sandstone,' estimated to be sixteen hundred (1600) feet below the surface of the ground, or a less depth if the Board of Trustees shall so decide."

The specifications further provided that below the 400 foot level the well shall be drilled of a diameter of not less than 8 inches to the Potsdam sandstone, or less, as the Village may require. The specifications further provided that the Board of Trustees reserve the right to stop drilling at a lesser depth than that necessary to reach the Potsdam sandstone, if it deemed it expedient.

Specifications further provide, under section 17, that when the engineer believed the water bearing strata had been penetrated to a sufficient depth, a test should be made and that if the well failed to furnish the requisite amount of water, which it was provided was to be - 500 gallons per minute - the drilling was to continue until the necessary flow had been obtained.

Under the heading "General Conditions" the contract provided, section 25, that the contractor should perform all the work specified under the direction and superintendence of the engineer and to his entire satisfaction, approval and acceptance, and that the material used should be subject to his inspection and approval or rejection, based upon the specifications.

From the testimony it appears that the work was started by the plaintiff April 19, 1931, and that the site was located by the engineer Allen; that the well was driven down, in accordance with the terms of the contract, until a point was reached

and provided further:

THE WELL IS TO BE DRILLED TO A DEPTH OF 100 FEET
OR THEREABOUTS, THE DEPTH BEING DETERMINED BY THE
GEOLOGICAL SURVEY, AND THE WELL IS TO BE DRILLED
TO A DEPTH OF 100 FEET OR THEREABOUTS, THE DEPTH
BEING DETERMINED BY THE GEOLOGICAL SURVEY.

The geological location provided that before the

100 foot level the well shall be drilled to a depth of not

less than 8 inches to the bottom sandstone, or less, as the

strata may require. The geological further provided that

the Board of Trustees reserve the right to stop drilling at a

depth less than that necessary to reach the bottom sandstone.

It is deemed it expedient.

Geological further provide, under section IV,

that when the engineer believes the water bearing strata has

been reached to a sufficient depth, a test should be made and

that if the well failed to furnish the requisite amount of water,

which is not provided for in the contract, the contractor

drilling was to continue until the necessary flow had been ob-

tained.

Under the heading "General Conditions" the contract

provided, section 26, that the contractor should perform all the

work specified under the direction and supervision of the

engineer and to his entire satisfaction, approval and acceptance.

and that the material used should be subject to his inspection and

approval or rejection, and that upon the completion of the

From the testimony it appears that the work was com-

pleted by the plaintiff April 19, 1901, and that the site was located

by the plaintiff, and the well was drilled down, in accor-

dance with the terms of the contract, until a point was reached

approximately 1162½ feet; that from that point on he continued to drill with an 8 inch drill and supplied 7½ inch pipe instead of the 8 inch pipe required by the specifications until he had reached the depth of 1600 feet and that, thereupon, he advised Allen that he had completed the well in accordance with the provisions of the contract; that he, at the request of Allen, thereupon made a test for water, and after the test was instructed to drill deeper. The plaintiff, thereupon, refused to proceed with the contract further, charging that the contract provided that he was to drill to a distance of 1600 feet, or less, and that he was required only to penetrate the Potsdam sandstone.

It is insisted on behalf of the Village that the meaning of the term "penetrate the Potsdam sandstone" means to go through that formation. Plaintiff's theory of the case is that "penetrate" did not mean to go through the Potsdam sandstone, but only to go into it and that this had been done. It is insisted further on behalf of the Village, first, that by continuing the work of drilling below the 1162½ foot level, at a circumference which admitted only a 7½^{inch} casing, that he had violated the terms of his agreement; secondly, that the work was done in such a manner that the drilling was not straight nor plumb and that it was impossible to lever the proper pipe in place to the bottom of said well.

As to the first of these propositions, plaintiff introduced testimony to the effect that it was done after a talk with the engineer and with his consent and that the change was not a material change and consequently subject to the approval of the engineer. As to the second proposition, plaintiff introduced evidence showing that the well was straight and

approximately 1100 feet; that from that point on he continued
until the 2 inch pipe reached by the specifications until he had
reached the depth of 1000 feet and that, however, he advised
Allen that he had completed the well in accordance with the spec-
ifications of the contract; that he, at the request of Allen, there-
upon went to the well for water, and after the test was conducted to
the satisfaction of the engineer, the engineer, advised in regard to
the contract that the contract provided that
he was to drill to a distance of 1000 feet, or less, and that he
was required only to penetrate the bottom formation.

It is insisted on behalf of the Village that the
evidence of the fact that the engineer's testimony is
that the contract provided that the contract provided that
the "penetration" did not mean to go through the bottom formation,
but only to go into it and that this had been done. It is further
insisted on behalf of the Village, first, that by continuing
the work of drilling below the 1000 foot level, at a distance
thereof which exceeded only a ¹/₂ inch, that he had violated
the terms of his agreement; secondly, that the work was done in
such a manner that the drilling was not straight nor down and
that it was impossible to insert the proper pipe in place so the
bottom of the well.

As to the fact of these propositions, the
introduced testimony to the effect that it was done after a
talk with the engineer and with his consent and that the change
was not a material change and consequently subject to the ap-
proval of the engineer. As to the second proposition, the
introduced evidence shows that the well was drilled to the

plumb and in full compliance with the terms of the agreement.

Considerable expert testimony was introduced as to the character of the underlying geological formation of this particular region, and from the reports of the State geologist, it appears that St. Peters Sandstone was encountered at a depth of between 900 and 1200 feet and then came a stratum of Prairie du Chien limestone and that at a depth of 1340 feet Potsdam sandstone was encountered.

It further appears from the testimony that the Potsdam sandstone was of great thickness and consisted of sandstone and shales, and that this has never been completely gone through or perforated by drillers in the Chicago district. That the first layer of this Potsdam sandstone is the principal water producing layer in this district; that at a distance below the 2,000 foot level salt water is encountered; that at and in the vicinity of the Village of Desplaines, there is a peculiar formation caused by a peculiar displacement of the rock formation; that the chance of obtaining water by drilling in this district is remote and that previous wells which had been drilled in this district had been failures.

Testimony was introduced to the effect that a well of a sufficient diameter to contain a 7 $\frac{1}{4}$ inch pipe or casing, would be sufficient to carry a flow of 500 gallons per minute. The question as to whether or not the engineer consented to the change from the 8 inch to the 7 $\frac{1}{4}$ inch pipe was one of fact for the jury and we do not believe that this objection on the part of the Village is material, particularly in view of the fact that after the plaintiff had reached the 1800 foot level and had re-

found and in full compliance with the terms of the agreement.

Investigative report regarding the limestone as to

the character of the underlying geological formation of the

geological region, and from the reports of the State geologist.

It appears that the limestone is composed of a hard

and dense rock and that it is a member of the limestone

formation and that it is a member of the limestone

formation and that it is a member of the limestone

It further appears from the testimony that the

has been found to be of great thickness and composed of sandstone

and shale, and that this has never been completely gone through

or perforated by drilling in the Chicago district. That the

first layer of this limestone is the principal

producing layer in this district; that at a distance below the

2,000 foot level only a few are encountered; that at and in the

vicinity of the village of Hampshire, there is a peculiar formation

which caused by a peculiar displacement of the rock formation;

that the chance of obtaining water by drilling in this district

is remote and that previous wells which had been drilled in this

district had been failures.

Testimony was introduced to the effect that a well

of a sufficient diameter to contain a 7 1/2 inch pipe or casing,

would be sufficient to carry a flow of 500 gallons per minute.

The question as to whether or not the defendant intended to the

change from the 6 inch to the 7 1/2 inch pipe was one of fact for

the jury and we do not believe that this objection on the part of

the village is material, particularly in view of the fact that

after the plaintiff had reached the 1,000 foot level and had re-

fused to continue, the work was continued by the Village, but without success and with a 6 inch pipe or casing. The endeavor of the Village to obtain water on its own responsibility resulted in a further expenditure of \$20,000 with no practical result, so that it can not be said, as a matter of fact, that the failure of the plaintiff to continue the work with an 8 inch pipe had anything to do with the final result, namely, the failure to obtain the 500 gallons of water per minute, the amount required by the contract.

It is evident that it was not the failure of the contractor to supply the pipe that resulted in the failure to obtain the water, but the failure was caused by the physical conditions of the geological formation through which the attempt to procure water progressed.

In this regard the case at bar differs materially from the cases cited by counsel where work for a municipal corporation had been constructed differently from the plans and specifications. In those cases cited, the work was completed, but, when finished, did not comply with the material requisites of the agreement.

In the case at bar it made no difference from the facts and the testimony of the experts whether the work was continued with a 16 inch pipe throughout its entire length or with a 7½ inch pipe, because it was impossible to procure the desired result, namely, a 500 gallon flow of water per minute under any circumstances. The purpose sought to be accomplished was speculative and not one which was certain of attainment. We see no reason why the contractor should be called upon to sustain the loss, where it is apparent that a comprehensive review of the

There is nothing, the work was continued by the Village, but
at least someone had a 1000 ft. of material. The evidence
of the Village to obtain water on the own responsibility remained
in a further expenditure of \$50,000 with no material result.
We find it can not be said, as a matter of fact, that the failure
of the plaintiff to continue the work with an 8 inch pipe had
anything to do with the final result, namely, the failure to ob-
tain the 500 gallons of water per minute, the amount required by
the contract.

It is evident that it was not the failure of the con-
tractor to supply the pipe that resulted in the failure to obtain
the water, but the failure was caused by the plaintiff's negligence
of the defendant's negligence through which the plaintiff is entitled
to recover.

In this regard the case at bar differs materially
from the case cited by counsel where work for a municipal cor-
poration had been completed differently from the case at
bar. In those cases cited, the work was completed,
but, when finished, did not comply with the material provisions
of the agreement.

In the case at bar it made no difference from the
facts and the testimony of the experts whether the work was com-
pleted with a 10 inch pipe through which the water would be
a 7 1/2 inch pipe, because it was impossible to procure the required
result, namely, a 500 gallon flow of water per minute under any
circumstances. The purpose sought to be accomplished was spec-
ific and not one which was certain of attainment. It was no
reason why the contractor should be called upon to maintain the
line, where it is apparent that a comprehensive review of the

- , -

geological history of this district would have shown that it was practically impossible of accomplishment. The meaning of the contract, itself, as to whether or not plaintiff had complied with its terms when he had sunk the well to a distance of 1600 feet and had penetrated Potomac sandstone at a level of 1344 feet, is one of interpretation of the contract and requires no authorities other than the meaning of the words themselves as therein contained. The word penetrate may well mean to enter into and not to go through. According to Webster's Dictionary it means, "to pierce and enter into"; according to the Century it means, "to pierce into or through."

The intent of the parties may be ascertained from the fact that the distance of 1600 feet, approximately, was the distance fixed by the agreement.

The right of the Village to continue drilling should be coupled and read with the rest of the contract which provided that the well should be drilled 1600 feet, or less, and the Village had the right under the agreement to stop work at any time before the 1600 foot level was reached, or to cause the contractor, after a test, to continue drilling which, from the meaning of the contract, as we gather it, would be to continue drilling after the test any distance from the agreed 1600 foot level. If it had been the intention of the contract that the plaintiff should continue beyond the 1600 foot level, it could easily have contained a provision to the effect that he should continue drilling to the 1600 foot level, more or less, and not limit it to drilling to the 1600 foot level, "or less", leaving out the "more".

geological history of this district would have shown that it was
practically impossible of accomplishment. The meaning of the
contract, itself, as to whether or not liability had been
with the terms when he had sunk the well to a distance of 1500
feet and had penetrated to some extent at a level of 1500 feet,
in case of interpretation of the contract and regulation as to
this other than the meaning of the words themselves as therein
contained. The said guarantee may well mean to enter into and
not to go through. According to Webster's Dictionary it means,
"to enter and enter into"; according to the Century it means,
"to enter into a bargain."

The intent of the contract may be ascertained from the
fact that the distance of 1500 feet, approximately, was the dis-
tance fixed by the agreement.

The right of the village to continue drilling should
be coupled and read with the rest of the contract which provided
that the well should be drilled 1500 feet, or less, and the vil-
lage had the right under the agreement to stop work at any time
before the 1500 foot level was reached, or to cease the drilling
or, after a test, to continue drilling when, from the working of
the contract, as we gather it, would be to continue drilling after
the test was finished from the agreed 1500 foot level. It is
had been the intention of the contract that the liability should
continue beyond the 1500 foot level, it would easily have con-
tained a provision to the effect that the village should continue drilling
to the 1500 foot level, more or less, and that it is to drill-
ing to the 1500 foot level, "or less", leaving out the "more".

Moreover, the specifications contain a clause that, below the 400 foot level, the well shall be drilled of a diameter of not less than 8 inches to the Potsdam sandstone, or less, which would indicate that the Village did not intend to go beyond the 1800 foot level but, on the other hand, intended to stop at the Potsdam sandstone if it should be reached at a point less than the level fixed by the agreement.

This case has been twice tried, and the trial court and the jury had the opportunity of hearing and seeing the witnesses. We have examined the instructions and find no reason to disturb the verdict by reason of any error apparent therein.

From the facts, we are of the opinion that the plaintiff herein complied with the terms of the agreement and, for the reasons stated herein, the judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

HOLDEN, P. J. AND TAYLOR, J. CONCUR.

Below the 1000 foot level, the well shall be drilled to a depth of not less than 2 inches to the bottom sandstone, or less, when well indicates that the village did not extend to beyond the 1000 foot level but, on the other hand, indicated in view of the bottom sandstone it is shown to be located at a depth less than the level line in the sandstone.

1. The first step in the process of identifying and assessing the risks of a project is to identify the potential risks. This can be done by conducting a risk assessment, which involves identifying the potential risks and their likely impact on the project. The next step is to assess the risks, which involves determining the likelihood of each risk occurring and the potential consequences if it does. This can be done by using a risk matrix, which is a tool that helps to identify the risks and their potential impact. The final step is to develop a risk management plan, which involves identifying the measures that will be taken to avoid, reduce, or transfer the risks. This plan should be updated regularly as the project progresses.

From the Treaty, we are of the opinion that the
plaintiff herein received also the terms of the agreement and
the same were stated clearly, the language of the Treaty being

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MORTUARY INSURANCE COMPANY OF N. Y.,
a Corporation.

Appellee.

vs.

F. E. BRUGHAS,
Appellant.

2a
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE O'CONNOR

DELIVERED THE OPINION OF THE COURT.

On November 4, 1927, plaintiff had a judgment by confession entered in his favor and against defendant in the Municipal court of Chicago. The basis of the judgment was a promissory note executed by defendant. The note was for \$1707.33, payable in monthly installments of \$142.37. The amount of the judgment was for \$1147.79, which included \$96.60 attorney's fees for having the judgment entered.

The ordinary printed statement of claim used in such cases was filed by the plaintiff, in which it is set up that the note in suit was attached to and made a part of the statement of claim. (The note is not so attached but the record discloses that the court entered an order by which the plaintiff was given leave to withdraw the original note upon filing a certified copy of it. No copy is found in the record.)

On December 12, 1927, the defendant moved the court to vacate the judgment and the order recites that the motion was over-ruled and the defendant prayed for and was allowed an appeal to this court upon filing a bond in the sum of \$1500 within thirty days and bill of exceptions within sixty days. Nothing further appears to have been done until January 4, 1928, when the defendant moved the court to vacate the judgment. The motion was then continued until January 11, 1928, when the order of December 12

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On December 11, 1977, the defendant moved the court to vacate the judgment and the order received that the action was over-ruled and the defendant prayed for and was allowed an award of costs upon filing a bond in the sum of \$1000 within thirty days and bill of exceptions within sixty days. Regarding the award of costs, the court has ruled that the defendant is entitled to costs upon filing a bond in the sum of \$1000 within thirty days and bill of exceptions within sixty days. Regarding the award of costs, the court has ruled that the defendant is entitled to costs upon filing a bond in the sum of \$1000 within thirty days and bill of exceptions within sixty days. Regarding the award of costs, the court has ruled that the defendant is entitled to costs upon filing a bond in the sum of \$1000 within thirty days and bill of exceptions within sixty days.

was vacated and the motion continued until January 23. On January 23, 1928, an order was entered over-ruling the defendant's motion to vacate the judgment. The defendant prayed an appeal to this court which was allowed upon his filing a bond in the sum of \$1500 within thirty days and a bill of exceptions within sixty days. The bond was afterwards filed and approved on February 26, 1928, the defendant filed what is designated in the record as a bill of exceptions, but which is nothing but a dialogue between court and counsel. The written motions filed, if any were filed, by the defendant, upon which he predicated his right to have the judgment opened up, are not in the bill of exceptions nor are they in the record at all, although it is certified by the clerk of the Municipal court as being complete. Upon an examination of the abstract, however, we find, following the certificate of the clerk of the court, what purport to be two petitions, verified by the defendant, which were apparently the basis of his motion. Obviously they cannot be considered on this appeal because they are not a part of the record. However, if we might consider them, they are entirely insufficient.

The first petition that appears in the abstract is said to have been filed December 12, 1927, on which date the court entered an order over-ruling defendant's motion to vacate the judgment. The second petition found in the abstract purports to have been filed January 4, 1928, and from the abstract this took the place of the one filed on December 12. So that the later petition, even had both been properly filed and shown of record, is the only one that might be considered. However, we will consider both of them. The substance of the first petition attempts to set up a reason why the judgment should be vacated and the defendant given leave to defend. It set up that on March 31, 1926, the defendant purchased an automobile for \$2380 and gave his note, upon which the judgment was confessed, in payment of a part of the purchase price;

and received the same in the month of January, 1917.

It is to be noted that the petition was filed in the month of January, 1917.

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The petition was filed in the month of January, 1917.

that the payment of the note was secured by a chattel mortgage on the automobile; that about June 28, 1936, the defendant met with an accident in which the automobile was damaged and thereupon defendant placed it in the garage of the Milda Auto Sales Co., to whom the promissory note was made payable; that shortly thereafter the owner of the note and chattel mortgage seized the automobile and sold it without notice to the defendant, contrary to the provisions of the statute, and that by reason thereof "your petitioner has the right to claim a sum equal to double the value of said chattel mortgage in case of a foreclosure of the chattel mortgage in violation of the statute;" that at the time of the seizure of the automobile certain installments of the note were due "so that if the plaintiff purchased said note after the seizure of said automobile, it is not a bona fide purchaser, and that plaintiff held it subject to all defenses which the defendant had against the original owner of the note and chattel mortgage; that if the plaintiff had purchased the note before the automobile was seized, the plaintiff was liable to the defendant for foreclosing the chattel mortgage in violation of the statute." The petition further sets up on information and belief, that the automobile was sold for \$900, and prays that that sum be deducted from the amount of the judgment, and that defendant may recoup the amount of his damages as above set forth. The allegations of this petition are so uncertain and indefinite that obviously the action of the court in denying the motion was proper.

The second petition appearing in the abstract sets up that the face of the note in suit was \$1707.33; that the defendant paid two installments, one of \$142.36 and one of \$142.97; "that the automobile in question was foreclosed upon and sold for \$950, leaving a balance of \$499.73; that the plaintiff is claiming the sum of \$431.04 for the cost of repairing the automobile in question; that the said damage to the automobile was covered by an abandonment

that a payment of the debt was made by a third person in
the amount of \$100,000; that about June 28, 1930, the defendant was with
an assistant in which the automobile was damaged and destroyed and
the amount claimed is on the page of the bill of sale \$100,000, to
show the property was made payable; that shortly thereafter
the owner of the auto and checked mortgage called the automobile and
would it without notice to the defendant, contrary to the provisions
of the mortgage, and that by reason thereof, your petitioners and the
plaintiff claim a sum equal to double the value of said checked mortgage
plus in case of a foreclosure of the checked mortgage in violation
of the statute; that at the time of the sale of the automobile
certain instruments of the note were not "on hand" in the plaintiff's
possession and note after the sale of said automobile, it is not
a valid mortgage, and that plaintiff will be subject to all
actions which the defendant has against the plaintiff on account of the
sale and checked mortgage; that it is claimed that purchased the
note before the automobile was sold, the plaintiff was liable to
the defendant for releasing the checked mortgage in violation of
the statute. The plaintiff further sets up an intention and
claim, that the automobile was sold for \$200, and says that that
sum be deducted from the amount of the judgment, and that defendant
pay through the amount of his damages as above set forth. The also
alleges that the plaintiff was an incompetent and insolvent when
obtain the action of the court in keeping the action was proper.
The second petition appearing in the attached case is
that the time of the sale is said was \$100,000; that the defendant
paid two installments, one of \$100,000 and one of \$100,000; that the
automobile in question was purchased from the plaintiff for \$200, leaving
a balance of \$100,000; that the plaintiff is claiming the sum of
\$200,000 for the cost of replacing the automobile in question; that
the said sums in the automobile was covered by an endorsement

insurance policy issued by the plaintiff; that said sum cannot be allowed in this proceeding because the judgment can only be confessed upon the note for the sum due on the note as shown on the face of the note." The prayer of the petition was that the judgment in excess of \$489.72, plus attorney's fees, be vacated. If this petition may be construed to mean that after the automobile was damaged plaintiff had it repaired at an expense of \$431.04 and then sold it under the chattel mortgage for \$950 and credited the defendant with the difference between these two sums, the judgment would not be vacated for the reason that the plaintiff had not given the defendant credit for the \$950, because we must assume, in the absence of any showing to the contrary, that little or nothing could have been obtained for the automobile unless the repairs were made, and a judgment by confession is not opened up for errors of law, not only where a defense upon merits clearly appears. Brunswick v. Hurley, 131 Ill. App. 235; Koyces v. Schendorf, 238 Ill. 236. And under the circumstances it would be inequitable to credit defendant with the \$950.

Plaintiff contends that a petition to open up a judgment of the Municipal court filed thirty days after the judgment has been entered is authorized by sec. 21 of the Municipal Court act. That section has no application to judgment entered by confession. Lake v. Cooks, 15 Ill. 353; Wynn v. Teomang, 24 Ill. 403.

For the reasons stated the judgment of the Municipal court of Chicago is affirmed.

AFFIRMED.

McSurely and Matchett, JJ., concur.

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32391

UNITED MILITARY STORES, INC.,
a corporation,

Appellee,

v.

EMANUEL SCHWARTZ, SAMUEL SCHWARTZ
and JOSEPH W. RUBENS, sued as
Joseph W. Schwartz,
Appellants.

APPEAL FROM CIRCUIT

COURT, COOK COUNTY.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal from an interlocutory injunction granted upon bill and answer with supporting affidavits on motion to dissolve.

Both parties are engaged in the business of selling and distributing military uniforms and goods. Complainant did business under the name of the United Military Stores and Associated Military Stores. Defendants did business under the name of Chicago Military Stores, and the gist of complainant's bill is that the use of this name by defendants would perpetrate a fraud upon the military personnel of the United States Army and the defendants would be able to "pass off" their goods and merchandise as the merchandise of complainant, because persons buying would confuse the names of complainant and defendant.

The chancellor granted a preliminary injunction restraining the defendants from: (1) mailing, delivering or sending by express, messenger or otherwise, or publishing or distributing defendants' catalogue marked Exhibit "C"; (2) using the words "Military Stores" in conjunction with the name "Chicago" or any other generic name so as to mislead the public; (3) using certain cuts and plates contained

in a catalogue issued by the complainant marked Exhibit "B"; and (4) assigning or transferring or circulating discs, cuts or plates copied from figures contained in complainant's catalogues marked Exhibits "A" and "B".

Both parties have upon this appeal presented the merits of the controversy. In appeals from interlocutory orders, we do not determine the merits of the controversy, but from the record presented determine whether the interlocutory order is necessary to maintain the status quo and preserve the equitable rights of the parties until the matter has been determined by a final decree.

McDouglass Co. v. Woods, 247 Ill. App. 170.

The bill was filed by the United Military Stores, an Illinois corporation organized to sell military goods and military accoutrements. It is alleged that the Associated Military Stores had offices in Chicago and in Fort Leavenworth and Camp Lewis; that the Associated Military Stores acquired the good will and merchandise of Maurice Barnette, who had been engaged for seven years in selling military goods under the trade name of Associated Military Stores; that Barnette is the president of the Associated Military Stores and also of the United Military Stores; that Barnette had built up a large clientage at great expense by means of circulars, printing matter and catalogues, one of which is attached as Exhibit "A"; that he had spent \$2,000 in obtaining drawings and cuts for his catalogue and for the catalogue of the United Military Stores and had expended large sums of money in advertising the Associated Military Stores and more particularly the words "Military Stores;" that persons identified military stores with the words "Associated

(*) Analysis on corresponding or identical sites on different copies from different individuals is significant if calculated using

With parties have upon this appeal presented the motion of the court. In appeals from inferior courts, we do not determine the merits of the controversy, but from the facts presented determine whether the inferior court is necessary to maintain the right and preserve the equitable rights of the parties until the matter has been determined by a final decree.

The bill was filed by the United Military Nurses, an

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Military Stores" and relied upon the same as representing a certain unexcelled quality of military goods which conformed with the regulations of the United States Army; that the Associated Military Stores was adjudged bankrupt and its goods, drawings and good will were sold to the vice-president of the United Military Stores which took over the trade name of the Associated Military Stores and has continued to issue the catalogues Exhibits "A" and "B"; that complainant's mail order business has depended upon these printed catalogues which had been procured at great expense.

The bill further alleged that April 2, 1926, complainant learned that defendants commenced to do business as the Chicago Military Stores and had plagiarized the cuts and printed matter of complainant's catalogues as shown by Exhibit "C", which is a copy of defendants' catalogue; that the purpose of defendants in copying complainant's catalogues is solely to take unfair advantage of complainant in trade competition; that defendants contemplate mailing out their catalogue, Exhibit "C", which would be a fraud on the public by using the name of Chicago Military Stores, which is easily confused with the names of the United Military Stores and of the Associated Military Stores, whereby complainant would suffer great and irreparable damage, unless the injunction should issue.

The answer of the defendants alleges that Maurice Barnette traded under the name and style of Associated Military Stores at Fort Leavenworth and Camp Lewis, Washington, but never traded in Chicago under that name; denies that Barnette trading as Associated Military Stores built up any clientage in Chicago, but on the contrary states that his business was entirely outside of Chicago until he became associated with the Illinois corporation known as

Military Stores" and relied upon the same as representing a certain unexcelled quality of military goods which conformed with the regulations of the United States Army; that the Associated Military Stores was adjudged bankrupt and its goods, drawings and good will were sold to the vice-president of the United Military Stores which took over the trade name of the Associated Military Stores and has continued to issue the catalogues Exhibits "A" and "B"; that complainant's mail order business has depended upon these printed catalogues which had been procured at great expense.

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Associated Military Stores; denies that complainant had the exclusive right to any of the cuts in Exhibits "A" and "B" and alleges that all such cuts had been published without being copyrighted and are public property; denies that the words "Military Stores" have been appropriated by the complainant exclusively or could be so appropriated; admits that the Associated Military Stores was adjudged bankrupt December 15, 1927; denies that the United Military Stores has ever sent out or printed any catalogue similar to defendants' catalogue Exhibit "C" and denies that the complainant has an exclusive right to the use of the words "Military Stores." The answer denies that defendants have taken from complainant's catalogues any cuts or plagiarized any printed matter; denies that the catalogue of defendants is for the purpose of defrauding or tricking the public; asserts that defendants have done business in Chicago under the name of Chicago Military Stores for, at least, two years and eight months before the bill of complaint was filed and over a year before the complainant was incorporated or engaged in business in Chicago. Defendants admit the printing of their catalogue Exhibit "C" and that they contemplate mailing the same, but deny any fraud therein; assert that the cuts in defendants' catalogue were not taken from the complainant's catalogue, but were procured from other sources with permission. Defendants deny that they were "palming off" the goods which they were selling as the goods of the United Military Stores or of the Associated Military Stores or of Maurice Barnett, and assert that the goods of defendants were of as good quality as those sold by these parties; deny that they pretended to anyone that they were the Associated Military Stores or engaged in business with or associated with

either the Associated or the United Military Stores; deny that there has been unfair competition.

The facts presented by affidavits are that since September 1, 1925, defendants have been engaged in the sale of military goods at 442 South State street and at 532 South State street, Chicago, under the name of Chicago Military Stores, with a large sign extending across the sidewalk in front of each store bearing the words in large letters "Chicago Military Stores." On October 5, 1925, defendants wrote to the "Associated Stores, Ft. Leavenworth, Kans.," asking for a catalogue of its military supplies and subsequently in the same month ordered some badges and aviation ornaments. About April 8, 1926, Maurice Barnette called at defendants' store at 442 South State street, Chicago, and introduced himself, saying he was engaged in the same line of business at Fort Leavenworth, Kansas; up to this time Barnette had not been engaged in business in Chicago or in Illinois. April 15, 1926, a charter was granted by the Secretary of State of Illinois to Barnette and associates incorporating the Associated Military Stores, Inc., for the purpose of dealing in military uniforms and merchandise; Barnette then commenced business in Chicago for the first time. November 3, 1927, the Associated Military Stores was adjudicated a bankrupt and the vice-president of the United Military Stores purchased from the trustee the good will, trade name, catalogues and all chattels and wares. December 31, 1927, the United Military Stores was incorporated with Maurice Barnette as president and took over the business theretofore conducted under the name of Associated Military Stores. In April, 1928, complainant learned that the Chicago Military Stores had printed and was about to mail out its

which the association of the United Military Service Club

there has been no other organization.

The latter presented by affidavit the fact that the

1. 1917. The latter have been engaged in the work of military service

at the same place and at the same time as the latter.

under the name of Chicago Military Service, with a large sign on

standing across the sidewalk in front of each store having the

sign in large letters "Chicago Military Service". On October 1,

1917, the latter were in the "Chicago Military Service" building.

There, the latter for a number of the military service and the

activity in the same month showed some progress and activity

thereafter. About April 1, 1917, the latter were in the

place at the same time as the latter, and the latter

saying he was engaged in the same line of business at that time.

work, however; up to this time the latter had not been engaged in any

work in Chicago or in Illinois. April 1, 1917, a number of persons

of the society of 1917 of Illinois in Chicago and elsewhere

thereafter the latter military service, but the latter

of failing in military service and elsewhere; the latter

business in Chicago for the time being. November 1, 1917,

the latter military service and elsewhere a number of persons

vice-president of the United Military Service Club from the

times the latter were in the same place and the latter

work. December 1, 1917, the latter military service and the

related with the latter service as president and took over the

business thereafter conducted under the name of the latter

military service. In April, 1918, the latter service and the

Chicago Military Service Club had printed and was sent to mail and the

catalogue of military goods and merchandise under the name of Chicago Military Stores which they had been using continuously since September 1, 1915, and the bill in question was filed and the preliminary injunction issued.

The basis of the injunctive relief sought is alleged unfair competition. This "consists in the sale of the goods of one manufacturer or vendor for those of another, and if defendant so conducts its business as not to palm off its goods as those of complainant, the action fails." DeLong Co. v. Mump Hairpin Co., 297 Ill. 359. This has been followed in Stevens Davis Co. v. Hather & Co., 230 Ill. App. 45, in which the opinion contains a comprehensive study of the rule with a large number of cited cases.

Applying this to the instant case, we do not find any actual "palming off" of defendants' goods on a purchaser as the goods of complainant and no such deception is claimed by complainant, although there is some suggestion to this effect by reason of some correspondence with a Captain Dougherty; but in the reply of defendants to him it is specifically stated that defendants were not connected with any other concern.

Complainant, however, seeks relief under the rule that, where the facts show that deception will be the natural and probable results of defendants' acts, there is unfair competition which will entitle complainant to relief. In Johnson Mfg. Co. v. Johnson Skate Co., 313 Ill. 106, the court said:

"While it is sufficient to make out a case of unfair competition to show that deception will be the natural and probable result of a defendant's acts, either actual or probable deception and confusion must be shown. If there is no possibility of confusion there is no unfair competition, and where the deceptive tendency is not clear, equity will not enjoin until actual deception has resulted. Mere possibility of deception is not enough. (Columbia Engineering Works v. Gallery, 73 Ore. 542.)"

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the People of the East (CLPE) in the United States. The Commission is therefore unable to provide any information on this subject.

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...the latter is often used to refer to the state dependencies

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implications for teachers of mathematics may not be limited to those

For a full and complete description of the model, see the following references:

1. The first group of people who are interested in the results of the study are the researchers themselves. They want to know if the study was successful in achieving its objectives and if the results are consistent with their expectations.

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Journal of Management Education 33(10) 1123-1136

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1984-1985, 1986-1987, 1988-1989, 1990-1991, 1992-1993, 1994-1995, 1996-1997, 1998-1999, 2000-2001, 2002-2003, 2004-2005, 2006-2007, 2008-2009, 2010-2011, 2012-2013, 2014-2015, 2016-2017, 2018-2019, 2020-2021, 2022-2023, 2024-2025, 2026-2027, 2028-2029, 2030-2031, 2032-2033, 2034-2035, 2036-2037, 2038-2039, 2040-2041, 2042-2043, 2044-2045, 2046-2047, 2048-2049, 2050-2051, 2052-2053, 2054-2055, 2056-2057, 2058-2059, 2060-2061, 2062-2063, 2064-2065, 2066-2067, 2068-2069, 2070-2071, 2072-2073, 2074-2075, 2076-2077, 2078-2079, 2080-2081, 2082-2083, 2084-2085, 2086-2087, 2088-2089, 2090-2091, 2092-2093, 2094-2095, 2096-2097, 2098-2099, 2100-2101, 2102-2103, 2104-2105, 2106-2107, 2108-2109, 2110-2111, 2112-2113, 2114-2115, 2116-2117, 2118-2119, 2120-2121, 2122-2123, 2124-2125, 2126-2127, 2128-2129, 2130-2131, 2132-2133, 2134-2135, 2136-2137, 2138-2139, 2140-2141, 2142-2143, 2144-2145, 2146-2147, 2148-2149, 2150-2151, 2152-2153, 2154-2155, 2156-2157, 2158-2159, 2160-2161, 2162-2163, 2164-2165, 2166-2167, 2168-2169, 2170-2171, 2172-2173, 2174-2175, 2176-2177, 2178-2179, 2180-2181, 2182-2183, 2184-2185, 2186-2187, 2188-2189, 2190-2191, 2192-2193, 2194-2195, 2196-2197, 2198-2199, 2200-2201, 2202-2203, 2204-2205, 2206-2207, 2208-2209, 2210-2211, 2212-2213, 2214-2215, 2216-2217, 2218-2219, 2220-2221, 2222-2223, 2224-2225, 2226-2227, 2228-2229, 2230-2231, 2232-2233, 2234-2235, 2236-2237, 2238-2239, 2240-2241, 2242-2243, 2244-2245, 2246-2247, 2248-2249, 2250-2251, 2252-2253, 2254-2255, 2256-2257, 2258-2259, 2260-2261, 2262-2263, 2264-2265, 2266-2267, 2268-2269, 2270-2271, 2272-2273, 2274-2275, 2276-2277, 2278-2279, 2280-2281, 2282-2283, 2284-2285, 2286-2287, 2288-2289, 2290-2291, 2292-2293, 2294-2295, 2296-2297, 2298-2299, 2300-2301, 2302-2303, 2304-2305, 2306-2307, 2308-2309, 2310-2311, 2312-2313, 2314-2315, 2316-2317, 2318-2319, 2320-2321, 2322-2323, 2324-2325, 2326-2327, 2328-2329, 2330-2331, 2332-2333, 2334-2335, 2336-2337, 2338-2339, 2340-2341, 2342-2343, 2344-2345, 2346-2347, 2348-2349, 2350-2351, 2352-2353, 2354-2355, 2356-2357, 2358-2359, 2360-2361, 2362-2363, 2364-2365, 2366-2367, 2368-2369, 2370-2371, 2372-2373, 2374-2375, 2376-2377, 2378-2379, 2380-2381, 2382-2383, 2384-2385, 2386-2387, 2388-2389, 2390-2391, 2392-2393, 2394-2395, 2396-2397, 2398-2399, 2400-2401, 2402-2403, 2404-2405, 2406-2407, 2408-2409, 2410-2411, 2412-2413, 2414-2415, 2416-2417, 2418-2419, 2420-2421, 2422-2423, 2424-2425, 2426-2427, 2428-2429, 2430-2431, 2432-2433, 2434-2435, 2436-2437, 2438-2439, 2440-2441, 2442-2443, 2444-2445, 2446-2447, 2448-2449, 2450-2451, 2452-2453, 2454-2455, 2456-2457, 2458-2459, 2460-2461, 2462-2463, 2464-2465, 2466-2467, 2468-2469, 2470-2471, 2472-2473, 2474-2475, 2476-2477, 2478-2479, 2480-2481, 2482-2483, 2484-2485, 2486-2487, 2488-2489, 2490-2491, 2492-2493, 2494-2495, 2496-2497, 2498-2499, 2500-2501, 2502-2503, 2504-2505, 2506-2507, 2508-2509, 2510-2511, 2512-2513, 2514-2515, 2516-2517, 2518-2519, 2520-2521, 2522-2523, 2524-2525, 2526-2527, 2528-2529, 2530-2531, 2532-2533, 2534-2535, 2536-2537, 2538-2539, 2540-2541, 2542-2543, 2544-2545, 2546-2547, 2548-2549, 2550-2551, 2552-2553, 2554-2555, 2556-2557, 2558-2559, 2560-2561, 2562-2563, 2564-2565, 2566-2567, 2568-2569, 2570-2571, 2572-2573, 2574-2575, 2576-2577, 2578-2579, 2580-2581, 2582-2583, 2584-2585, 2586-2587, 2588-2589, 2590-2591, 2592-2593, 2594-2595, 2596-2597, 2598-2599, 2600-2601, 2602-2603, 2604-2605, 2606-2607, 2608-2609, 2610-2611, 2612-2613, 2614-2615, 2616-2617, 2618-2619, 2620-2621, 2622-2623, 2624-2625, 2626-2627, 2628-2629, 2630-2631, 2632-2633, 2634-2635, 2636-2637, 2638-2639, 2640-2641, 2642-2643, 2644-2645, 2646-2647, 2648-2649, 2650-2651, 2652-2653, 2654-2655, 2656-2657, 2658-2659, 2660-2661, 2662-2663, 2664-2665, 2666-2667, 2668-2669, 2670-2671, 2672-2673, 2674-2675, 2676-2677, 2678-2679, 2680-2681, 2682-2683, 2684-2685, 2686-2687, 2688-2689, 2690-2691, 2692-2693, 2694-2695, 2696-2697, 2698-2699, 2700-2701, 2702-2703, 2704-2705, 2706-2707, 2708-2709, 2710-2711, 2712-2713, 2714-2715, 2716-2717, 2718-2719, 2720-2721, 2722-2723, 2724-2725, 2726-2727, 27

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15. *...and the ...*

There is no possibility of confusion here in my words.

10. Knowledge of the law - The witness is not a lawyer and does not know the law.

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have actually been deceived, but an injunction will lie to prevent a vender from putting goods upon the market in such a form and manner as to deceive the purchasing public into the belief that such goods were made by complainant.

Was the catalogue of the defendants, Exhibit "C," so formed and printed as to have a tendency to deceive the public into believing that the goods therein advertised were sold by the complainant? Examination shows that there is a marked difference between them. Defendants' catalogue has a bright, glossy, orange cover with dark maroon border and ornaments with the words "Chicago Military School, 420 S. State St." in large black type in the upper left-hand corner; there are no pictures on the cover. Complainant's catalogues have yellowish drab covers with no borders and with pictures of soldiers, horses and the sun on the cover with the words "Associated Military Stores, 320 West Jackson Blvd." in the center of the cover page. There is a difference in the type of the catalogues and in the manner in which they are printed. Each left-hand page of defendants' catalogue has on the top line "Chicago Military Stores" in large black type, while complainant's catalogues have the name "Associated Military Stores, Inc." in small and lighter type. Complainant's catalogues have the back cover printed, while defendants' catalogue has an unprinted back cover page. Complainant's catalogues measure 6 x 9 inches; defendant's catalogue 5½ x 8½ inches.

Complainant asserts that the cuts or pictures of soldiers in uniform are the same. We find this is true of a few of them, but the record shows that these few cuts that are the same were procured by defendants from and with the permission of Clayton Smith, a concern in Chicago manufacturing military uniforms. The catalogue of Clayton Smith is in the record and some

These specimens were examined, and the following will be found:
There is a small piece of paper, which was found in the same place
and which is in the handwriting of the same person as the others.
This piece of paper was made by the same person.

The following is the handwriting of the same person, written on
paper and dated as to have a history of having been written
and written in the same handwriting as the others.

The following is the handwriting of the same person, written on
paper and dated as to have a history of having been written
and written in the same handwriting as the others.

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of the cuts showing uniforms are the same as thoseⁱⁿ both the catalogues of complainant and the catalogue of defendants, indicating that both complainant and defendants obtained their cuts from Clayton Smith. Another cut appearing in defendants' catalogue, also appearing in complainant's catalogues, was furnished by Hart, Schaffner & Marx, the manufacturer of the particular uniform.

It is obvious that military uniforms must be uniform in appearance, hence the word "uniform," and any picture or cut would be like any other picture of them. It follows, therefore, that the fact that some of the cuts which appear in defendants' catalogue Exhibit "C" resemble or are the same in appearance as some of those in complainant's catalogues does not lead to establish the allegations of complainant's bill that the defendants' catalogue was intended and calculated to deceive the public.

There is virtually no sameness in the printed matter, only the usual similarity found in all trade jargons "boosting" the same line of goods.

Complainant has not acquired an exclusive right to the use of the words "Military Stores." Complainant admits that no one can obtain any exclusive proprietary right in any generic terms. Generic terms or mere descriptive words are the common property of the public. Internat. Com. Y.E.C.A. v. Y. E. C.A., 194 Ill., 194.

However, it is contended that an injunction will lie to restrain the use of such terms at the suit of one who has already adopted them, where the evidence shows a fraudulent design and that the public will be misled. Internat. Com. Y.E.C.A. vs. Y.E.C.A., 194 Ill., 194; Koebel v. Landlards' Treasuri. Bureau, 210 Ill. 176; Allegretti vs. Allegretti Chocolate Cream Co., 177 Ill. 129. We are not holding that a case might not be made showing the use of a word, ordinarily of descriptive or generic

nature, which by reason of long continued exclusive use and application to a certain commodity had acquired a quality of peculiar value to the user; in such a case a court of equity might prevent another from using such a name with a fraudulent intent to deceive. The record before us, however, does not make out such a case.

Barnette was not doing business in Chicago or in Illinois until April, 1926, when he entered the Chicago field and had the Associated Military Stores incorporated. If there was any invasion of right it was on the part of Barnette, who, by invading defendants' field, sought to compete with them by adopting a name so similar to theirs that there might be some confusion. In Ambassador Hotel Co. v. Sherman Co., 226 Ill. App. 272, the complainant was denied an injunction restraining the defendant from using the words "Ambassador Hotel," basing the conclusion largely upon the fact that the defendant was first in the field in Chicago and had the prior right, and since the complainant had not entered the Chicago field, there could be no unfair competition on the part of the defendant.

We repeat that we are passing only upon the propriety of the preliminary injunction. We are not now concerned with whether or not evidence may disclose facts which would call for the exercise of injunctive relief. Upon the record before us we cannot agree with the chancellor that the preliminary injunction was necessary, and the order will therefore be reversed.

REVERSED.

O'Connor, P. J., and Batchett, J., concur.

32083

249 I.A. 651

E. F. GUINAN, INC.,
a Corporation,
Complainant.

vs.

CHICAGO & MILWAUKEE STEAMSHIP CO.,
Defendant.

FRANK FINESTHWAIT, Intervening Petitioner,
Appellant,

vs.

CHICAGO TITLE AND TRUST COMPANY,
Receiver for Chicago and Milwaukee
Steamship Company,
Appellee.

APPEAL FROM CIRCUIT
COURT OF COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

One Goldman was appointed receiver of the Chicago and Milwaukee Steamship Company, an Illinois corporation, on January 5, 1923. He was succeeded by the Chicago Title and Trust Company on May 14, 1923. The appointment of Goldman was made upon the petition of certain creditors of the corporation.

The company had possession of the steamer "Norlund" upon an agreement with Finesthwait for purchase. This steamer sank while making a trip from Chicago to Milwaukee on November 13, 1922. No salvage was recovered.

One Pixley, who held certain insurance policies on the Norlund as security for premiums which he advanced, collected \$21,998.85 thereon. Upon an order obtained from the Circuit court, without notice to other parties interested, Pixley turned over to Goldman as receiver \$11,930.57 of the proceeds of these insurance policies, and held a balance of \$3323.85.

On December 15, 1923, the receiver (being authorized) accepted from Pixley \$2698.85, together with a receipted bill for \$425 from one C. E. Kramer and the assignment of uncollected

100.4.61

100.4.61

W. F. GIBSON, JR.
a Corporation

WILLIAM A. GIBSON, JR.
a Corporation

WILLIAM A. GIBSON, JR.
a Corporation

WILLIAM A. GIBSON, JR.
a Corporation

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a Corporation

WILLIAM A. GIBSON, JR.
a Corporation

The company was organized under the laws of the State of New York, and its principal office is located at 100.4.61. The company is engaged in the business of manufacturing and selling various types of machinery and equipment. It has a capital of \$1,000,000 and is owned by William A. Gibson, Jr. and his family. The company has a long history of success and is well known in the industry.

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policies in full settlement and discharge of the obligations of Pixley in connection with these policies.

Finsthwait obtained leave to intervene and filed a petition and afterwards an amended petition setting up these payments made to the receiver and other facts under which he claimed to be the owner, and prayed to have a first lien to the extent of \$12,800 with interest thereon at six per cent per annum from August 24, 1922, on all the insurance moneys collected and to be collected. He prayed that his right, title and interest might be declared superior to that of the right, title and interest of all others and that the receiver and Pixley might be severally required to pay that amount to him.

Pixley and the receiver were made defendants, but petitioner afterwards dismissed as to Pixley. The receiver and certain creditors answered, denying the right of petitioner to receive the money. The matter was heard by the chancellor who after a consideration of the evidence entered a decree finding that petitioner did not have any prior right, lien or preference in and to the proceeds of the insurance policies or the insurance or to the funds in the hands of the receiver. The claim was, however, allowed as an unsecured obligation without any preference or priority, and from that decree Finsthwait has perfected this appeal.

The facts are practically undisputed and are as follows:

On August 24, 1922, Finsthwait was the owner of the "Norland" and upon that date entered into an agreement with the steamship company whereby he agreed to sell and the steamship company to buy the steamer for \$22,500, paying \$2500 upon signing, and agreeing to pay \$2500 on September 30, \$2500 on October 30, \$2500 on November 30 thereafter, and the balance at the rate of \$500 a month beginning December 30, 1922, all deferred payments

relation in full settlement and discharge of the obligations of
Wiley in connection with these matters.

Witnesses obtained leave to interview Mr. Wiley.

Witnesses and attorneys on several occasions during the past few
months made to Mr. Wiley and other persons who are alleged
to be the owner, and persons to have a claim upon the estate of
\$12,000 with interest amounting to six per cent per annum from August
31, 1917, on all the known and unknown claims and to be satisfied
he should have his rights, title and interest in the same and
power to deal with the same, title and interest of all claims and
that the receiver and Wiley might be personally liable to pay
that amount to him.

Wiley and the receiver were made defendants, but
several attempts were made to dismiss the receiver. The receiver was
satisfied to answer, denying the right of plaintiff to
receive the money. The matter was heard by the court and the
after a consideration of the evidence a judgment was rendered
that plaintiff did not have any claim upon the estate of
in and to the proceeds of the insurance policies on the life of
or to the funds in the hands of the receiver. The court held, and
that, allowed as an amended complaint without the admission of
plaintiff, and that the receiver should be discharged from liability.
The facts are summarily outlined and set out in this

page.

On August 24, 1917, the receiver was the owner of the
"Wiley" and upon that date entered into an agreement with the
attorney company whereby he agreed to sell and the attorney
company to pay the amount of \$12,000, with interest thereon
and agreeing to pay \$1000 as expenses of the receiver and
to be paid on or before the 1st day of September, 1917, the sum of
\$1000 a month beginning September 1, 1917, all interest on the

to be made in notes bearing interest at six per cent per annum and to be secured by a mortgage on the steamer. Finsthwait also guaranteed the steamer to operate between Chicago and Milwaukee for one year from the expiration of the certificate in December, 1922. This agreement, however, did not include making repairs or renewals due to damage caused after the delivery of the steamer to the purchaser, either while the steamer was in operation or lying idle. This agreement further provided:

"That the purchaser shall insure said steamer in the sum of Twenty thousand dollars (\$20,000) and pay the premiums therefor; said insurance to be in favor of Frank Finsthwait, or as interests may appear."

Thereafter the steamship company took possession of the steamer and insured it for \$25,000 but made itself the sole beneficiary and did not cause any insurance to be written for Finsthwait or in his interest. On December 8, 1922, the steamship company assigned all its insurance policies to H. D. Pixley of Chicago as security for premium advances made and paid on the policies of insurance.

A letter of the steamship company dated December 5, 1922, is signed by Reckman as its vice-president and general manager, is addressed to Pixley, and states:

"We beg to advise that the Chicago and Milwaukee Steamship Company acknowledges that the sum of \$12,500 is due on the purchase price of the steamer 'Berland' and we ask, after the amount advanced by you has been paid by the insurance companies that you pay to Frank Finsthwait, 149 Broadway, New York City, \$12,500 due him on contract of purchase of August 24th."

On December 11, 1922, Pixley wrote Finsthwait at New York as follows:

"Enclosed find agreement to be guided by the request contained in the Chicago & Milwaukee Steamship Company's letter of December 5th, and further agreeing not to accept settlement with the underwriters without first notifying you and giving you the opportunity to reimburse me for money advanced and expenses I have incurred in connection with this loan."

On the same date Pixley wrote Finsthwait at New York:

"I acknowledge receipt of the Chicago & Milwaukee Steamship Company's letter under date of December 3, 1922, directing payment to you of the sum of \$12,500 out of the proceeds of the insurance on the S/S Norland, the policies having been assigned to me by the Chicago & Milwaukee Steamship Company, and I hereby accept the terms of said letter of the Chicago & Milwaukee Steamship Company.

I will agree not to accept settlement with the underwriters without first notifying you, and give you the opportunity to pay me the money advanced with expenses I have been put to in connection with this loan."

On December 21, 1923, the receiver received from Fixley the further sum of \$2095.88 which had been collected on the insurance policies after payment theretofore made, and thereupon Fixley assigned to the receiver all policies of insurance which had not theretofore been paid. Suit was brought on these policies by the receiver against the respective insurance companies. The suit was decided adversely to the receiver. The insurance companies, however, thereafter paid to the receiver the further sum of \$528.50 and at the time of the entry of the decree the receiver had in his possession the sum of \$5921.12, together with other policies of insurance on the cargo carried by the steamship Norland which had not been collected.

The decree finds that Finsthwait is a creditor of the steamship company in the principal sum of \$12,500, and it appears from the evidence, without contradiction, this sum is due to Finsthwait for the unpaid purchase price of the steamer Norland under the contract of August 24, 1922.

There is uncontradicted evidence tending to show that there was an agreement between Finsthwait and the steamship company that the bill of sale for the Norland was not to be delivered until \$10,000 had been paid, and as a matter of fact no bill of sale or mortgage was ever executed. At the time the steamship company took possession of the Norland it was insured. Hoskins, representing the steamship company, stated that he could get insurance at a

less rate; therefore the insurance then on the ship was cancelled and a temporary binder taken out during its transit from New York to Chicago. This binder was made out in favor of Finsthwait. When the binder expired the insurance company took out new insurance to the amount of \$35,000 payable to itself alone, and in violation of the agreement Finsthwait's interest was not mentioned in the policy.

The evidence further tends to show that the *Horland* before it was sold to the steamship company had been registered for foreign trade in the office of the collector of customs in New York and in the name of Finsthwait as owner, and after the sale on September 5, 1920, it was enrolled for domestic trade in New York in the name of Finsthwait as owner. On October 9 the ship was enrolled in the office of the collector of customs in Detroit in the name of Finsthwait as owner.

It is the contention of Finsthwait that the agreement between the steamship company and himself constituted a conditional sale of the ship and that the enrollment of the same in the name of Finsthwait in the office of the collector of customs was notice to the creditors of the steamship company of the rights of Finsthwait; that he had an insurable interest in the ship. These propositions are supported by many authorities cited. Chickering v. Bagtrass, 130 Ill. 306; U. S. Ship Mortgage Act, of 1920, sec. C. (a), Fed. Stats. Ann. (2nd ed.) 1920 Supp.; Weston v. Penniman, Fed. Case No. 17455, 1 Mason 306; Sharer-Gillitt Co. v. Long, 318 Ill. 432, and 26 Corp. Jur. 20, are only a few of the authorities cited to these points.

Finsthwait also contends that the agreement to insure the steamship for his benefit gave him a prior right to the proceeds of any insurance policies taken out by the company on the ship for its own benefit, and that he has a prior right in the insurance proceeds superior to that of the steamship company or the rights of

any person claiming through or under the company. Orange Hill Co. v. Western Assurance Co., 113 Ill. 396; Wheeler v. Insurance Co., 101 U. S. 439, and many other cases cited also seem to sustain this contention.

Finsthwait further contends that the breach of the agreement to insure for the steamship company gives him a right in the insurance proceeds superior to that of general judgment and attaching creditors and a priority over the rights of the receiver of the steamship company. In re Zitron, 303 Fed. 79; Wilder v. Fatta, 138 Fed. 435; Sansen v. Blake, 185 Fed. 342; Stebbins v. Westchester Fire Ins. Co., 197 Fed. 913, and Smith & Furbush Machinery Co. v. Hughes, 177 Fed. 910, which are cited and sustain the contention. The brief and argument of the defendant do not attempt to discuss or distinguish these cases.

Finsthwait further contends that the writing delivered to Pixley by the steamship company operated as an equitable assignment of the insurance policies in favor of Finsthwait, citing 2 R. C. L. 614; Phelps v. Northup, 56 Ill. 156, and many other cases.

Finsthwait also argues that a partial assignment of the funds is good in equity, citing authorities which so hold, and contends that an order against uncollected funds is a good assignment in equity on the authority of Phelps v. Northup, *supra*; Colchour v. Pass, 143 Ill. App. 530; 32 Am. & Eng. Ann. Cases, 577; Pomeroy's Eq. Jur., sec. 1280. These authorities so hold.

He further contends that the rights of an assignee in an equitable assignment are superior to those of general, subsequent or attachment creditors, and this proposition is sustained by Warren v. First Nat'l Bank, 149 Ill., 9, and other Illinois authorities. No attempt is made by the receiver to distinguish any of these cases, nor is it contended that the same do not sustain the propositions to which they are cited.

The receiver argues, however, on the authority of Christmas v. Russell, 14 Wall. 69, Comm'l Nat'l Bank v. Kirkwood, 172 Ill. 503, Ex re Ballenling, 186 Fed. 91, and Novell & Co. v. Morgan & Co., 214 Ill. App. 506, that Vinethwait can not follow and recover the proceeds of the insurance policies.

In Christmas v. Russell, *supra*, Christmas held three notes of Lyons, payable to himself, which he assigned and delivered to his son, who compromised with Lyons, delivering the notes up to the maker who executed in favor of the son, H. H. Christmas, two other notes instead of those which he had received from the father. These notes were secured by a mortgage upon real estate. H. H. Christmas hypothecated one of the notes to secure a debt. Suits were brought upon these notes, the one in the name of H. H. Christmas for his own use and the other for the use of the party to whom the note was hypothecated. A bill was also filed to foreclose the mortgage. H. H. Christmas made an agreement with Mary Christmas, whereby she assumed the payment of the debt due upon the hypothecated note, and he transferred such note to her. The note was paid out of the property of Mary Christmas and delivered up, after which the foreclosure bill was amended by substituting her as a party. Judgment was taken upon the other note. The complainants then filed their bill, alleging the recovery of a judgment against Richard Christmas by Russell; that this judgment was taken to the Supreme court of the United States by a writ of error; that one Yerger and one Anderson became sureties on the error bond, and the judgment being affirmed became liable on their bond. The bill averred the sureties executed the bond upon a promise of indemnity by their principal and that he had subsequently given them a lien for that purpose upon one of the original notes which (it was averred) attached to the notes taken in substitution for them; that Richard Christmas was insolvent, and complainants asked to be subrogated

The following is a list of the names of the persons who have been named in the foregoing petition.

JOHN A. BROWN, of the County of Jefferson, State of Mississippi, is one of the persons named in the foregoing petition.

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to the rights of the sureties and that they might enforce the alleged lien in satisfaction of the judgment.

The evidence relied on to support the lien consisted of letters from Richard Christmas to Yerger, written before Richard transferred to H. M. Christmas the notes originally given to Richard by Lyons. In one of these letters he said:

"I feel great uneasiness about your liability on the bond in suit of Russell against me. I have ever held the Lyons note as sacred for the payment of this debt, and have it now in New York, endeavoring to sell it, with the mortgage, to pay this debt; I expect to hear from it daily. If not sold I will send it to you as soon as I return."

Again he wrote:

"I could not safely send you the Lyons note by mail as it is payable to me or bearer--hence if lost might put me to much trouble."

Again he wrote:

"You may rest assured I will protect you with the Lyons note."

Later he wrote telling of the transfer of the notes to H. M. Christmas and saying: "In this I hope I have not lost sight of my purpose to protect you."

The court said that these letters contained no words of transfer nor anything which could be so construed; ^{at} ~~that~~ the most the same were only evidence of a promise to pay the judgment, if affirmed, out of the proceeds of one of the notes and to send the note, if not sold, to Yerger. The court said:

"An agreement to pay out of a particular fund, however clear in its terms, is not an equitable assignment; a covenant in the most solemn form has no greater effect. * * * The assignor must not retain any control over the fund -- any authority to collect or any power of revocation. If he do, it is fatal to the claim of the assignee. The transfer must be of such a character that the fund-holder can safely pay, and is compellable to do so, though forbidden by the assignor."

Commercial Nat'l Bank v. Kirkwood, supra, and Revell & Co. v. Morgan & Co., 214 Ill. App. 326, were suits at law involving the right of a third party to sue upon a promise made in the contract of others for the benefit of such third party, and the question of

to the extent that it is not possible to determine the exact date of birth of the individual.

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40. *Journal of the American Medical Association*, 1991; 265: 1039-1041.

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1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

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ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED
DATE 08-11-2010 BY 60322 UCBAW/SJS

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11. Name of the person or persons who have been interviewed: [REDACTED]

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1990-1991

"...you shall still say before the Lord your God: 'I have been a slave'."

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

English and French names of species are given in parentheses. (English name first)

U.S. GOVERNMENT PRINTING OFFICE

[illegible]

1. The first group of people who were interviewed were the members of the family who were living in the same house as the deceased. They were asked to provide information about the deceased's personality, habits, and any other relevant information. The information provided by these people was used to create a profile of the deceased.

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1. The first of these is the fact that the majority of the population of the United States is now living in urban areas. This is a result of the process of urbanization, which has been going on since the beginning of the 20th century. The population of the United States has increased from about 100 million in 1900 to over 200 million in 1950. At the same time, the population of rural areas has decreased from about 100 million in 1900 to about 50 million in 1950. This has led to a concentration of the population in urban areas, which has had a number of important consequences. One of the most important is that it has led to the development of a new type of urban organization, which is based on the concentration of population in a few large cities. This has led to the development of a new type of urban organization, which is based on the concentration of population in a few large cities. This has led to the development of a new type of urban organization, which is based on the concentration of population in a few large cities.

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A. Chaves was assistant professor at the Univ. Calif. Berkeley

See also: [Bibliography](#)

THE RIGHT OF A CHILD TO A HEALTHY ENVIRONMENT

to include all the information which should be included and not exclude it

equitable assignment was not involved. In re Hollenback, 136 Fed. 91, reversed 179 Fed. 548. That was a case where an assignee of a legacy (the assignment having been made as security for the payment of the assignor's notes for \$80,000) in order to get certain creditors to release their attachment, agreed, with the approval of the assignor, to pay the claims of these creditors, "from the money coming into our hands on account of" the assignor, who thereafter became bankrupt. It was said that the assignment to the assignee was only a mortgage; that the assignee had no right at any time to receive more than enough to satisfy its own debt, and this was all in fact that it ever received. Therefore, there being nothing in which the promise might apply, it did not operate as an equitable assignment.

As the attorney for petitioner points out, these cases are all distinguished by the fact that, although the assignment was valid, the fund upon which the assignment was supposed to operate never came into effect or materialized; while in this case Fixley received the fund and the assignment therefore did operate.

In 3 Poweroy's Eq. Jur. (3rd ed.) sec. 1280, p. 2560, it is said:

"In order that the doctrine may apply, and that there may be an equitable assignment creating an equitable property, there must be a specific fund, sum of money, or debt, actually existing or to become so in future, upon which the assignment may operate, and the agreement, direction for payment, or order, must be, in effect, an assignment of that fund or of some definite portion of it."

We shall not undertake any further review of the authorities, since the petitioner has cited a wealth of authority from this and other states, which the receiver does not attempt to distinguish.

We think the evidence shows an equitable assignment of this fund to the amount of \$12,800 in favor of Winthwait, the equities are with him, the receiver took the property subject to

that assignment and has no paramount equity. Republic Life Ins. Co. v. Swigert, 135 Ill. 150; Chicago Title & Trust Co. v. Smith, 153 Ill. 417.

For the reasons indicated the decree is reversed and the cause remanded with directions to enter a decree in favor of the intervening petitioner and in conformity with the views expressed in this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

O'Connor, P. J., and McSurely, J., concur.

that assignment was not on permanent basis. (Exhibit 111) 1941
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32524

FEDERAL MOTOR TRUCK COMPANY,
a Corporation,

Appellant,

vs.

E. L. COOK,

Appellee.

249 I.A. 651²

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This was an action in assumpsit upon a written guaranty. There was a trial by the court without a jury. Findings of fact and propositions of law were submitted by plaintiff, all of which were refused. The court found for defendant and entered judgment against plaintiff on the finding.

The plaintiff is a Michigan corporation, a manufacturer of trucks in Detroit. The defendant was the president of the Federal Motor Truck Company of Illinois, a corporation which was in the business of distributing trucks in Chicago. The Michigan corporation and the Illinois corporation entered into a written contract on January 3, 1922, which provided for the sale by the Michigan corporation of plaintiff's trucks to the Illinois corporation. This agreement expired by its terms on December 31, 1922. On February 14, 1923, the two corporations entered into another sales agreement, the terms of which were identical with those of the first contract.

On November 1, 1922, the defendant executed and delivered to the plaintiff a written guaranty in favor of the plaintiff, in and by which he gave his "absolute, unlimited" guaranty until notice should be given as provided. It guaranteed--

"The payment up to \$20,000 of any money or moneys due or to become due by the Federal Motor Truck Company of Illinois for the purchase of trucks and the full performance of all contracts, promises, agreements, understandings and obligations

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now existing or to exist in the future between the Federal Motor Truck Company of Detroit, a Michigan corporation, and the Federal Motor Truck Company, an Illinois corporation, pertaining to the purchase and sale of trucks, and the return of all trucks now in the possession of or which may in the future be in the possession of or under the control of the said Federal Motor Truck Company, an Illinois corporation, belonging to the Federal Motor Truck Company, a Michigan corporation."

The affidavit of claim which was attached to plaintiff's declaration alleged the sale by the plaintiff to the Illinois corporation of Truck No. 27319 for \$1184.50, delivered to defendant February 28; of Trucks Nos. 29232, 29233, 29234 and 29235, delivered to the Illinois corporation July 23, 1923, at the price of \$3369.13 each, amounting to \$13,476.52; of Truck No. 26241, sold to defendant November 3, 1923, at the price of \$1580.68, making a total sum of \$16,549.70. The affidavit showed credits paid on this account amounting to the total sum of \$13,725.79, leaving a balance claimed to be due of \$2823.90.

The defendant filed a plea of non-assumpsit and an amended affidavit of merits, by which it admitted the purchase price of the trucks, except as to No. 27319, in which there was a difference of only \$5. As to this the undisputed evidence shows that plaintiff's affidavit was correct. Defendant, however, averred that it was entitled to credits of an amount larger than the total claim of plaintiff. The affidavit alleged that as to the four trucks Nos. 29232, 29233, 29234 and 29235, the purchaser gave notes for same secured by a chattel mortgage to secure the balance of the purchase price; that the notes were discounted by Farmer and Cohn, Incorporated, at the direction of the plaintiff, and the entire net proceeds of the discount, amounting to \$11,591.66, were paid to the plaintiff by Farmer and Cohn; that in addition to such payment, the Illinois corporation caused to be delivered to the plaintiff as a further credit certain certificates of deposit which had been issued as part of the proceeds of the discount amounting to \$3,170,

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and that this amount was also in due course received by plaintiff and accepted on the purchase price; further, that on the resale of truck No. 26241, plaintiff received and accepted a certificate of deposit in the amount of \$680, for which only \$540 had been credited. The affidavit alleged that the Illinois corporation paid in excess of the invoice price for all the trucks and was not indebted, and that defendant had no notice of the alleged defaults.

After the evidence had been taken, defendant by leave again amended the affidavit of merits, admitting the execution of the contract of guaranty and sale and delivery of the motor trucks, but alleging as to the four trucks numbers 29232, 29233, 29234 and 29235 that the same were not sold to nor purchased by the Illinois corporation but were consigned to it. It averred that the corporation was a factor for the plaintiff as to these and not a purchaser, and it alleged that it had been contemplated that the Illinois corporation would equip the trucks at its own expense and sell them for the account of plaintiff; that the purchaser should give his notes and these should be delivered by the Illinois corporation to Farmer & Ochs, in accordance with an arrangement entered into between plaintiff and Farmer & Ochs, to the effect that this corporation would discount the notes and remit the proceeds to plaintiff; that the Illinois corporation sold the trucks as equipped, transmitted the notes to Farmer & Ochs, and the net proceeds were more than the amount of the consignment price of the trucks, and that the purchaser of the trucks paid his notes in full. It alleged that any money due the plaintiff from the Illinois corporation on account of the purchase of the trucks had been paid and discharged. As before, it was averred that upon a resale of truck number 26241 the plaintiff received and accepted in addition to the credit set forth in the affidavit of claim, a receipt for a certificate of deposit to the amount of \$680; that plaintiff accepted the receipt, together

with other payments, in full satisfaction, but gave the Illinois corporation a credit of only \$340 therefor.

There is practically no conflict in the evidence on material matters. It is proved that the notes given by Barrett, the purchaser, for the purchase price of the four trucks numbers 29232, 29233, 29234 and 29235 were by the Illinois corporation discounted to Farmer & Cohe, and that these notes have been paid in full to that corporation by Barrett. It is also undisputed that in connection with the resale of truck number 26241, plaintiff received a certificate of deposit for \$680, for which it gave credit only for the amount of \$340 (as plaintiff, however, contends properly - a contention which we will later consider.)

As to the four trucks, the defendant contends that the transaction in which the same were delivered was not a sale, but a bailment. If we assume the transaction was a bailment and not a sale, this would not relieve defendant of the obligation of his guaranty with respect thereto, since the guaranty as recited is broad enough, we hold, to cover a contract of bailment, as well as an agreement to sell or a sale.

The transaction in regard to the delivery of these four trucks took place about July 23, 1923. E. E. Wells, a sales manager of the plaintiff, was then in Chicago. He had general supervision for plaintiff of sales in Illinois and was responsible to the factory for sales from the Illinois district. Wells consulted with the salesman of the Illinois corporation from time to time and assisted by suggestions. Barrett wanted to buy the four trucks. Cook did not wish to invest money in the trucks. He says he told Wells he "would not be a party or interested in or responsible for the Barrett trucks because I did not know how they could be handled, that we were having trouble with Farmer & Cohe, that if he could devise a plan by which they could be handled I was perfectly

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willing to handle them and turn the entire proceeds over to the Federal Truck Company of Detroit to help liquidate the account, but otherwise I was not interested."

Wells also talked with McHugh, who was accustomed to issue instructions in the absence of Cook. Wells testified (his testimony is not denied by McHugh:)

"Mr. McHugh asked if it would be possible to work out a plan by which the trucks would be delivered to the Illinois company with the understanding that when turned over to the Barrett company and the notes properly made out, these notes would be submitted to Farmer & Ochs and the entire proceeds of the notes would be remitted direct to the Federal Motor Truck Company of Detroit and applied against the account of the Illinois company. I said I believed that such a plan could be worked out and I would immediately get in touch with the factory. I discussed the plan with Mr. Cook. He approved the plan. I took it up with the factory."

On July 23rd plaintiff sent to defendant mailing copies of invoices for each of these four trucks. These copies are on printed forms. In each copy the printed words "sold to" were stricken out, and in lieu thereof the words "consigned to" written in. There also appear on each of these copies, after the printed word "via," the words "drive away," indicating that the trucks were not sent by rail but were driven from the factory. In each copy there is this statement:

"This copy sent to you as notification of shipment. Regular invoices will follow in the usual way."

The price of each truck, together with tires and wheels, is stated on this to be \$3,271. The document further indicates that the trucks were sent to the Illinois corporation, care of E. E. Wells.

On July 28, 1933, the plaintiff wrote the Illinois corporation, attention Mr. E. L. Cook, saying:

"We send you herewith memo invoices covering drive-away by you of four trucks, Nos. 29232, 29233, 29234 and 29235. We understand that these trucks are for immediate delivery to the Barrett Company as soon as they have been equipped with bolsters and bodies, and that the sale is to be financed through Farmer & Ochs.

The total proceeds of the notes are to be remitted directly

to us by the financing company and are to be applied on the invoicing of the four trucks and any surplus to be applied against the past due items which we hold against your account.

We attach hereto a copy of our letter to Farmer & Ochs in connection with these trucks, instructing them as to our equity and we trust that you will confirm these instructions in accordance with your understanding with Mr. H. E. Wells.

We trust that you find the entire matter to have been handled in accordance with your understanding."

On August 22nd the Illinois corporation having taken the notes of Barrett in payment of the trucks, enclosed these notes to Farmer & Ochs, and stated:

"You may handle this deal in your usual manner and mail your remittance to Federal Motor Truck Co. of Detroit, Michigan, in accordance with Mr. H. E. Allen letter of July 28th."

A statement shows that the Illinois corporation received the notes of Barrett in the transaction for \$3975, \$3980, \$3960 and \$3975 respectively.

On August 22nd Farmer & Ochs wrote the Illinois corporation with reference to a truck sold to H. J. Tobler of Peru, Illinois, for which, the letter said, notes to the amount of \$2400 had been taken. In reply to the maturity notice, Tobler wrote in substance that while he had purchased a truck he had paid cash and had a bill of sale from the Illinois company. This letter of Farmer & Ochs said:

"We wired you on August 20th, asking for an explanation, but up to the present time have received no response."

The letter then goes on to state that the writer was holding a remittance of \$4678.12 covering two trucks sold to Barrett, the proceeds of which the Illinois corporation had been directed to turn over to plaintiff, and that the writer would not remit until this Tobler transaction was cleared up. Farmer & Ochs suggested that the Illinois company wire at once "a full explanation."

On August 29, 1923, plaintiff wrote the Illinois corporation, stating in substance that plaintiff had been informed by a telephone call from Farmer & Ochs that these remittances were being

IN 1935 THE DISTRICT COURT OF THE DISTRICT OF COLUMBIA, in its decision in the case of *United States v. American Tobacco Company*, 11 F.2d 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 9

the extent that the children received training

THE STATE OF TEXAS, COUNTY OF DALLAS, ss. I, the undersigned, a Notary Public in and for said State, do hereby certify that the foregoing is a true and correct copy of the original of the same, as the same appears from the records of said County.

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100. To remove the oil from the water, the water is poured into a container and the oil is skimmed off the surface.

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1. The first of these is the fact that the majority of the population of the United States is now living in urban areas. This is a result of the process of urbanization, which has been going on since the beginning of the 20th century. The population of the United States has increased from about 100 million in 1900 to over 200 million in 1950. At the same time, the population of rural areas has decreased from about 100 million in 1900 to about 50 million in 1950. This has led to a concentration of the population in urban areas, which has had a number of important consequences. One of the most important is that it has led to a change in the way of life of the majority of the population. In rural areas, the population has traditionally been engaged in agriculture, and the way of life has been based on the rhythms of the seasons. In urban areas, the population has traditionally been engaged in industry and commerce, and the way of life has been based on the rhythms of the clock. This has led to a number of differences between the two ways of life, including differences in the amount of leisure time, the amount of social contact, and the amount of participation in community activities. These differences have led to a number of problems, including the problem of social isolation, which is a major problem in urban areas. This is a result of the fact that the majority of the population in urban areas is now living in high-rise apartment buildings, which are often designed in a way that makes it difficult for people to interact with their neighbors. This has led to a sense of isolation and a lack of community spirit, which are both major problems in urban areas. Another important consequence of urbanization is that it has led to a change in the way of life of the majority of the population. In rural areas, the population has traditionally been engaged in agriculture, and the way of life has been based on the rhythms of the seasons. In urban areas, the population has traditionally been engaged in industry and commerce, and the way of life has been based on the rhythms of the clock. This has led to a number of differences between the two ways of life, including differences in the amount of leisure time, the amount of social contact, and the amount of participation in community activities. These differences have led to a number of problems, including the problem of social isolation, which is a major problem in urban areas. This is a result of the fact that the majority of the population in urban areas is now living in high-rise apartment buildings, which are often designed in a way that makes it difficult for people to interact with their neighbors. This has led to a sense of isolation and a lack of community spirit, which are both major problems in urban areas.

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The project of the 1961-62 season was to study the effects of the 1961-62 season on the 1961-62 season.

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of the world and the United States and the effects of political influences

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

held up because of the Tobler matter, and further said:

"We understand Mr. Wells talked this Tobler matter with you and you proposed to take immediate action to straighten out Farmer & Ochs on this deal. It was our understanding you were going to offer them your personal guarantee in regard to the Tobler notes, or otherwise take care of them.

It is the feeling here that it is very unjust to us to have our money tied up on this Barrett deal, because of the way the Tobler matter is being handled, and we certainly think you should take immediate steps to satisfy Farmer & Ochs so that they can make remittances to us."

The record seems to be devoid of any evidence tending to show an explanation of this Tobler matter, and since the Barrett notes were paid in full it would appear that the balance due on account of these trucks had not been received by the plaintiff because of the Tobler matter.

The defendant, however, contends (and the rulings of the court on propositions of law indicate the court held) that the transaction with reference to these four trucks was only a bailment and that through the arrangement made, Farmer & Ochs became the agent of the plaintiff; that as against the plaintiff, Farmer & Ochs had no right to hold up the proceeds of the Barrett notes because of the misunderstanding which had arisen with reference to the Tobler incident. We think the court erred in so ruling. Whatever the nature of the transaction may have been in the beginning, it ended in a transfer of the title to the trucks from the Illinois corporation to Barrett, the Illinois corporation receiving a consideration which was not the price named in the invoices which were sent. The letter shows that it was the intention of the parties to handle the transaction in the usual way, and in the usual way Farmer & Ochs did not act as agent for plaintiff. The letter of plaintiff shows that any surplus arising out of the sale of these trucks was to be credited by plaintiff to the general account of the Illinois corporation.

It follows that the Illinois corporation, and the de-

held up because of the Tobler matter, and further said:

"To understand Mr. Wells talked this Tobler matter with you and you proposed to take immediate action to straighten out Farmer & Ochs on this deal. It was our understanding you were going to offer them your personal guarantee in regard to the Tobler notes, or otherwise take care of them.

It is the feeling here that it is very unjust to us to have our money tied up on this Barrett deal, because of the way the Tobler matter is being handled, and we certainly think you should take immediate steps to satisfy Farmer & Ochs so that they can make remittances to us."

The record seems to be devoid of any evidence tending to show an explanation of this Tobler matter, and since the Barrett notes were paid in full it would appear that the balance due on account of these trucks had not been received by the plaintiff because of the Tobler matter.

The defendant, however, contends (and the rulings of the court on propositions of law indicate the court held) that the transaction with reference to these four trucks was only a bailment and that through the arrangement made, Farmer & Ochs became the agent of the plaintiff; that as against the plaintiff, Farmer & Ochs had no right to hold up the proceeds of the Barrett notes because of the misunderstanding which had arisen with reference to the Tobler incident. We think the court erred in so ruling. Whatever the nature of the transaction may have been in the beginning, it ended in a transfer of the title to the trucks from the Illinois corporation to Barrett, the Illinois corporation receiving a consideration which was not the price named in the invoices which were sent. The letter shows that it was the intention of the parties to handle the transaction in the usual way, and the usual way was for Farmer & Ochs to discount the paper and when it was collected, as agent of the Illinois corporation, to remit the same to plaintiff. The letter of plaintiff shows that any surplus arising out of the sale of these trucks was to be credited by plaintiff to the general account of the Illinois corporation.

It follows that the Illinois corporation, and the de-

that we have of the 10th of July, and the 10th of July.

"The 10th of July, 1864, was a day of great importance in the history of the South. It was the day when the Confederate Government, under the leadership of Jefferson Davis, issued a proclamation declaring that the Confederate States of America were no longer a part of the United States of America. This proclamation was a direct challenge to the Union, and it was a declaration of war. The Union, in response, issued a proclamation of its own, declaring that the Confederate States were no longer a part of the United States. This was a declaration of war on the part of the Union. The result was a civil war that lasted for four years, and it was a war that cost the lives of millions of people. The 10th of July, 1864, was a day that marked the beginning of the end of the Confederacy, and it was a day that marked the beginning of the end of slavery in the United States."

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defendant as its guarantor, are not entitled to credit for the moneys paid by Barrett to Farmer & Ochs and retained by Farmer & Ochs on account of the Tobler transaction.

The only other item of controversy in this account grows out of the sale on November 5, 1922, of truck No. 26241 at the net price, after deducting down-payment, of \$1,568.88. This truck was resold to Alfred Handschug. On February 2, 1923, plaintiff received on account of the balance due, \$152.78. On May 17, 1923, plaintiff received through the Fidelity & Casualty Company of New York the check of the Illinois corporation for \$755.90, to the order of plaintiff, the endorsements thereon showing that plaintiff cashed it. At the same time, the Fidelity & Casualty Company forwarded to plaintiff certificate No. 13639, issued by the Seaboard National Bank of the City of New York, for the amount of \$680. On the reverse side of this certificate appears this endorsement:

"For value received we hereby assign to the Federal Motor Truck Company, Detroit, Mich., all our right, title and interest in the Certificate of Deposit described in the receipt on the reverse side hereof."

If this certificate of deposit is regarded as accepted by the plaintiff for the full amount thereof, then the account as to truck No. 26241 has been paid in full. Plaintiff contends, however, that under the terms of its contract it was obligated to credit the Illinois corporation with only one-half of this amount, or \$340.

On May 25, 1923, plaintiff wrote Wells at Chicago, acknowledging the receipt of the check for \$755.90 and the certificate of deposit for \$680. It said:

"This is 20% of the value of the notes. We are not permitted to accept a Certificate of Deposit for more than 10% of the value of notes, in accordance with the Financing Plan under which we operate. If we had had time to get in touch with Farmer & Ochs before they handled this deal, we would have suggested that they issue two Certificates and two receipts. In this case

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the Americas (CLA) in the United States.

... al governo ...

10. The above information was obtained from the files of the FBI, New York City, and is being furnished to you for your information.

1. The first group of people who were arrested in the early 1950s were those who were active in the Communist Party of the United States of America (CPUSA). They were arrested on the basis of evidence that they were involved in espionage activities for the Soviet Union. The second group of people who were arrested in the early 1950s were those who were active in the CPUSA and were also involved in espionage activities for the Soviet Union. The third group of people who were arrested in the early 1950s were those who were active in the CPUSA and were also involved in espionage activities for the Soviet Union.

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WILSON, J. L. 1971. *Journal of the American Water Resources Association* 7: 103-110.

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1. *Formosa et al.* 2004

everywhere else.

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

Revised: 10/10/2013

1990-1991

However, that being the case, it is not clear that the Commission has the authority to require the Commission to conduct such an investigation.

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Approved for release 12-08-2013 pursuant to E.O. 13526

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.we could have accepted one at its face value and Chicago would have carried the other until maturity."

The letter also suggested to Wells that it would be necessary to secure an additional check from the Chicago company for \$340, upon receipt of which plaintiff would credit \$680 on account of the certificate, and, when collection was made from Farmer & Ochs, plaintiff would reimburse the Chicago company.

Plaintiff's position was also explained by a letter to the Illinois corporation under date of June 11, 1933, in which it asserted that Farmer & Ochs had retained twenty per cent of the amount involved covered by a certificate of deposit to the amount of \$680. The letter said:

"The writer explained to you that we could only credit you with half this amount, which would be 10% or \$340.00. We suggested that you let us have your check to cover for \$340.00 so that upon receipt of same we could issue a credit for the full amount, \$680.00. When the collection then had been made from Farmer & Ochs and we had received the \$680.00 we would reimburse you for the \$340.00 covered by the check we requested.

* * * * *

"Will you not kindly let us have the check for \$340.00 as agreed?"

The contract between plaintiff and the Surety company although offered in evidence by plaintiff, was excluded by the court. The record therefore does not show what the agreement was in this particular. However, the plaintiff retained the deposit certificate, and, so far as the evidence in this record discloses, still retains it. There is no evidence, however, that the certificate of deposit has been paid, and the general rule is that in the absence of an express agreement that the same shall be accepted as payment, the receipt of commercial paper of a third party for an existing debt is prima facie only conditional payment and constitutes actual payment only when it has been in fact paid. Hearti v. Rhodes, 66 Ill. 351; Bailey v. Perdrige, 134 Ill. 188; Smith v. Bankers Engineering Co., 186 Ill. App. 113. It follows that the defendant is liable to the amount of \$340 on this transaction. A

These results are only valid if the two bedrooms were always occupied by the same person. If the bedrooms were occupied by different persons, the results would be different.

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

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proper statement of the account upon which defendant is liable would appear to be as follows:

That the defendant is charged on account of the sale of truck No. 27319, with \$1184.80; of trucks numbers 29232, 29233, 29234 and 29235, with \$3369.13 each, or a total of \$13,476.88; of truck No. 26241, with \$1586.66; that defendant is entitled to credits on account of payments made on the Barrett trucks of \$11,148.33, \$2,328.19 remaining due thereon; on truck No. 26241 of \$1,248.66, \$340 remaining due; on account of truck No. 24246, \$1,236.73; on account of truck No. 24263, \$91.28, leaving a balance of \$2,523.98 due from the Illinois corporation to the plaintiff corporation, for which the defendant is liable as guarantor. The court erred in finding that nothing was due and in entering judgment on that finding.

For the error indicated, the judgment is reversed with a finding of facts and judgment here in favor of the plaintiff and against the defendant in the sum of \$2,523.98.

REVERSED WITH A FINDING OF FACTS AND
JUDGMENT HERE IN FAVOR OF THE PLAINTIFF
AND AGAINST THE DEFENDANT IN THE SUM OF
\$2,523.98.

O'Connor, F. J., and McSurely, J., concur.

Further statement of the witness upon cross-examination is as follows:

Q. Now, you say that the witness is not a witness?

A. Yes, the witness is not a witness in the case.

Q. Now, you say that the witness is not a witness in the case?

A. Yes, the witness is not a witness in the case.

Q. Now, you say that the witness is not a witness in the case?

A. Yes, the witness is not a witness in the case.

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A. Yes, the witness is not a witness in the case.

Q. Now, you say that the witness is not a witness in the case?

A. Yes, the witness is not a witness in the case.

We find as facts that the defendant, E. L. Cook, on November 1, 1933, entered into a written contract of guaranty in and by which he guaranteed to the plaintiff the payment of \$30,000 of any money or moneys due or to become due by the Federal Motor Truck Company of Illinois for the purchase of trucks and the full performance of all contracts, promises, agreements, understandings and obligations then existing or to exist in the future between the Federal Motor Truck Company of Detroit, Michigan, a Michigan corporation, and the Federal Motor Truck Company, an Illinois corporation, pertaining to the purchase and sale of trucks and the return of all trucks then in the possession of or which might in the future be in the possession of or under the control of said Federal Motor Truck Company of Illinois belonging to the Federal Motor Truck Company of Michigan; that the plaintiff accepted said guaranty, and in reliance thereunder sold and delivered to the said Federal Motor Truck Company of Illinois certain trucks; that there is a balance now due and owing to the plaintiff on account of these sales of \$2,523.98, which defendant is obligated to pay to the said plaintiff by reason of its said guaranty, and that the plaintiff is entitled to judgment against the defendant and in favor of plaintiff in this cause for said amount of \$2,523.98.

32724

249 LA. 651³

H. G. McRINE, Appellee,

vs.

G. B. NILES, Doing Business
as Jack Niles & Co.,
Appellant.

APPEAL FROM SUPERIOR COURT OF
COCA COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This appeal is by the defendant from a decree for complainant which found a liability for the amount of \$3326.23.

Complainant in his bill alleged that he was employed by defendant for a period beginning January 1, 1925, and ending July 1 of the same year, it being agreed that complainant should be paid as compensation and salary the sum of twenty-five per cent of the net profits made by defendant's business during that period; that complainant entered upon the employment and continued until February 7, 1926, and was at all times ready, willing and able to perform his duties, but that on that date he was wrongfully discharged by the defendant; that he had no means of gaining access to the books to determine the amount due him.

The defendant admitted the making of the contract but averred that the date of the execution of the same was January 31; alleged that complainant was a confidential employee and violated the confidence reposed in him and was discharged on account of disloyalty.

The cause was referred to a master who reported in favor of complainant, the matter being heard by the chancellor on exceptions to the report of the master. These exceptions were overruled and a decree entered as stated.

The defendant insists that that the findings of the master are manifestly and clearly against the weight of the evi-

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Office of the Attorney General
Washington, D.C.

Mr. J. Edgar Hoover
Director
Federal Bureau of Investigation
Washington, D.C.

RE: EDWIN ALBERT BELLINGHAM; and others in the same case.

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dence, and upon careful consideration we are persuaded this contention must be sustained. We base our conclusions upon facts which are practically uncontradicted.

On January 1, 1925, defendant was engaged in the wholesale furniture business at 1331 South Michigan Avenue under the name of Jack Kiles and Company. Defendant was the owner of the business, and for several years prior thereto employed complainant on a profit sharing basis, under which complainant received in full of his compensation twenty-five per cent of the net profits of the business.

Complainant says his duties were "almost everything;" he kept the books, he hired the bookkeeper, he traveled with defendant to Grand Rapids at market time, and in defendant's absence "took charge of the business." He says, "I was supposed to be his partner."

Complainant further testified that he had access to the books and knew all about the business, profits, etc. Indeed, his own evidence would have justified a finding that complainant held a confidential relationship to defendant in the business in which they were engaged. Such finding would not be inconsistent with the established fact as found by the master, that important matters of policy were usually determined by defendant as owner. The master's report should have found that such a relationship existed between complainant and defendant.

On January 10, 1925, defendant went to Florida and was absent from Chicago until January 31 thereafter, leaving the business in charge of complainant.

The real estate and building at 1331 South Michigan Avenue were at that time under lease from the owner to the Gold Furniture Company, whose lease would by its terms expire on May 1, 1925. Defendant occupied a part of the building under verbal

1. The first part of the report is a general introduction to the subject of the study. It discusses the importance of the study and the objectives of the research. It also provides a brief overview of the methodology used in the study.

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1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the People of the South (CLPS) in the United States. The Commission is therefore unable to determine whether the CLPS is a genuine organization or a front organization for the Government of the United States.

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4. SUBJECT: 1000 10th St NW, Washington, DC 20004
5. REASON: 1000 10th St NW, Washington, DC 20004
6. COMMENTS: 1000 10th St NW, Washington, DC 20004

arrangement made about March 6, 1924, which was later confirmed by a letter of the Gold Furniture Company to the defendant.

About this time the Gold Furniture Company was erecting a building of its own on Erie street, on the North side of Chicago, near the location of the building known as the Furniture Mart, 606 Lake Shore Drive. The Gold Furniture Company placed on the building at 1331 South Michigan avenue a painted sign indicating that it would move to its new building on Erie street May 1st. Complainant introduced evidence tending to show that this notice contained a statement that the business of defendant would thereafter be moved to the same place; this was not true, and the master after taking supplemental proofs found "the weight of evidence is that the removal notice sign on building at 1331 South Michigan avenue did not contain the name of or any reference to the defendant."

Defendant's stenographer testifies (and her evidence is not contradicted) that in the absence of defendant in Florida, the agent of the building 1331 South Michigan avenue came to the office and said he would like to see defendant about renewing the lease, and that she told him that defendant had said that if the agent came in with any information to mail it to him in Florida, and further, that she gave the agent defendant's address. She says that when Mr. McKee came in she told him that the agent had been there and asked for defendant's address, and that McKee said if the agent came back again he would talk to him. This conversation was in January, 1925, about the middle of the month, and about a week or ten days after defendant went to Florida.

On January 27, 1925, the complainant and one Brown entered into a written lease with the owners of the entire building, of which the space occupied by defendant was a part, for a period of two years, beginning May 1, 1925. This lease was made

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THE UNIVERSITY OF CHICAGO PRESS

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1. The first group of people who are interested in the results of the study are the researchers themselves. They want to know how well the study was conducted and whether the results are reliable and valid. They also want to know how the study was funded and whether there were any conflicts of interest.

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of members is equal to 1/2 of the total number of members.

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There are several other factors which may be considered in the study of the problem of the origin of the word "cancer".

the following: (1) the first three of steps 10-12 were merged

When a female has a male partner, she will lay the eggs, and the male will fertilize them. The male will also protect the eggs and the young.

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for the purpose of conducting a wholesale furniture business on the demised premises, and in May, 1925, complainant and Brown entered into the furniture business which they carried on at that place thereafter as copartners until a later date, when the business was incorporated.

Prior to January 1, 1925, Brown had been the agent in Chicago of Prestonia Manufacturing Company and the Period Cabinet Manufacturing Company. Upon that date he was succeeded as their agent by J. H. Craig, and about the middle of January Brown and complainant undertook to secure an agency for these two companies, which companies were, as a matter of fact, customers of the defendant. All this occurred prior to January 31 and while the defendant was absent in Florida. Defendant Miles returned to the office on January 31 and on that date the contract dated January 1, 1925, whereby defendant employed McKee for a period beginning January 1 and ending July 1, 1925, was executed.

It is uncontradicted that McKee secured the execution of this contract without informing Miles that he and Brown had already entered into a partnership agreement to conduct a furniture business in the building then occupied by Miles, had procured in Miles' absence a lease of the premises and had tried to take away two customers from defendant.

The master finds that McKee intended at this time to continue his employment with Miles during the period of the contract "and to become active in business with Brown only on expiration of period of that contract, and McKee's entering into lease of the building had no tendency to interfere in any way with the duties of his employment by Miles, but in May, 1925, after Miles had terminated the contract and discharged McKee, McKee entered into furniture business with Brown as above stated. There is no proof that McKee in new business entered into competition with

Niles or took from Niles any of his customers or trade."

The secrecy of McKee in connection with the transactions in which he was engaged is wholly inconsistent with this intention or those findings. McKee's duty as an employee was that of loyalty to the employer who had reposed confidence in him. It was not for him to decide whether these things would or would not harm the business. Niles was the owner, and the duty of McKee was to make a full disclosure to him as to the actual situation. As a matter of fact, on April 30, 1925, Niles removed his business, not to the new building owned by the Gold Furniture Company but to a building at 600 South Michigan avenue, and shortly thereafter, as the master finds, the building at 1331 South Michigan avenue was taken over by McKee and Brown, who began to conduct a furniture business therein, and who on June 30, 1925, organized the corporation of McKee and Company, which has since its organization conducted its furniture business at the same location.

We have no doubt that the reasonable expectancy which Niles had of the renewal of his lease was in the nature of a property or asset, of which he was deprived by the failure of McKee to make the disclosures his duties required him to make. Consumers Co. v. Parker, 227 Ill. App. 552.

We are not unaware of the conflicting evidence in this record upon the issues that are not controlling. It would be an arduous task to review this evidence, much of which (on both sides) is improbable, unreasonable and (we are fully persuaded) untruthful. However, the burden of proof was upon the complainant to show that he acted in good faith and with the full knowledge and consent of his principal. Fox v. Simon, 261 Ill. 316; Hobbs v. Monarch Ref. Co., 277 Ill. 326. He has not met that burden of proof, but on the contrary, we think the uncontradicted evidence shows that the defendant was justified in promptly discharging him upon learning

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the facts, not from his trusted employee (from whom he should have learned them) but from another. Our conclusion in this respect makes it unnecessary to consider other alleged errors assigned and argued. We will add, however, on the authority of Behariv v. Schinner & Black, 220 Ill. 138, that even had it been established that the discharge of complainant was wrongful, the evidence wholly fails to sustain the findings as to the amount of damages. For aught that appears in this record, complainant's profits from the partnership which had the benefit of his services after his discharge, may have exceeded the amount that would have been due him if the contract with defendant had been carried out.

For the reasons indicated the judgment is reversed and the cause remanded with directions to dismiss the bill.

REVERSED AND REMANDED WITH DIRECTIONS.

O'Connor, P. J., and McSurely, J., concur.

32753

249 I.A. 651⁴

FRANCIS FORREST, a Minor, by
WILLIAM FORREST, her Father
and Next Friend,
Defendant in Error.

vs.

FRANK CHMELER et al.,
Plaintiffs in Error.

HONOR TO CIRCUIT COURT
OF COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This writ of error was sued out by the defendants in the trial court to reverse a judgment in the sum of \$3,500 entered upon the verdict of a jury. The action was in case and was brought by the plaintiff by her next friend against Frank Chmeler, Lucie Sevels, Arthur Blue and Will Galvin, the first named of whom prosecutes this writ of error. Chmeler filed a plea of the general issue. The other defendants did not file any plea or pleas. On motion of plaintiff's attorney the suit was dismissed as to Sevels and the fourth count of plaintiff's declaration stricken.

The record shows that the cause was called for trial ex parte; that none of the defendants appeared either in person or by attorney, and the record does not disclose any order of default against either Arthur Blue or Will Galvin. A jury was called to try the issues and a verdict rendered against Chmeler, Blue and Galvin with damages assessed at \$3,500, upon which judgment was entered.

The plaintiff has not appeared in this court to defend the judgment and plaintiffs in error rely upon a single point, namely, that as no plea was filed by the defendants Blue and Galvin, or either of them, and as no order of default was entered against them, there was no issue to be tried by the jury and the verdict and judgment were therefore erroneous, and that, being erroneous as to one of the defendants, the judgment being a unit, cannot

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The President has been informed by the Secretary of State that the United States will continue to support the efforts of the Government of Cuba to achieve a peaceful settlement of the Cuban crisis.

As in one of the references, the following table is given:

stand. In support of this contention the plaintiffs in error cite Crabtree v. Green, 36 Ill. 276; Thomas v. McGuinness, 94 Ill. App. 248; Dickinson v. Sims, 128 Ill. App. 16; West Chicago E.L.R.Co. v. Harrison, Adams & Allen Co., 160 Ill. 368, and Lordis v. Patton, 158 Ill. App. 9.

The authorities cited sustain the contention of plaintiffs in error, and no authority being cited to the contrary, for the error indicated the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

O'Connor, P. J., and McSurely, J., concur.

249 I.A. 652'

454 - 32395

OLE FADERERN,
Appellee,

v.

CITY OF CHICAGO,
Appellant.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE GRILLEY DELIVERED THE OPINION OF THE COURT.

In an action for damages for personal injuries to plaintiff, occasioned by a large and deep hole in the pavement of Central avenue, just north of Potomac avenue, Chicago, there was a trial before a jury in July, 1927, resulting in a verdict finding the City of Chicago guilty and assessing plaintiff's damages at \$7,500. This appeal followed.

On the trial the City did not introduce any evidence in its behalf. Plaintiff and seven witnesses called by him testified, and all were cross-examined by the attorney representing the City.

The following facts in substance are disclosed by plaintiff's evidence: Plaintiff, about 63 years of age, was employed as a messenger by the Service State bank, located on the corner of North and Central avenues, Chicago. About 10:30 o'clock on the morning of March 12, 1926, he was a passenger in a Yellow taxicab and had beside him on the rear seat, inside the cab, a satchel containing a considerable amount of paper money. He also had on the floor of the cab about 15 bags of silver money. At the request of his employer he was conveying all of the money to another bank located in the loop district of Chicago. The cab, driven by the chauffeur, Harwick,

3491.A. 653

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RE: ALVIN KARPIS; EDWARD BREMER; THE BREMER KIDNAPING; THE BREMER

IN AN ORDER FOR PERSONAL INQUIRY TO BE MADE

WIT: accompanied by a large and deep hole in the pavement of Central
avenue, just north of Jackson Avenue, Chicago, about 1934
before 4:30 p.m. July, 1934, was a person looking for
City of Chicago Public and assessing Alvin Karpis's location at 1934.
This appeal followed.

On the trial the City and Alvin Karpis and Alvin Karpis
the result. Alvin Karpis was a person who was a person who was a person
and all were concerned by the Alvin Karpis investigation the City.
The following facts in connection with Alvin Karpis

Alvin Karpis; Alvin Karpis, about 35 years of age, was engaged

as a messenger by the City and Alvin Karpis, located on the street of

North and Central Avenue, Chicago, about 1934, was a person who was a person

at 1934, 1934. He was a person who was a person who was a person

placed him on the street, inside the City, and a person who was a person

considerable amount of money. He was a person who was a person who was a person

and about 15 bags of silver money. He was a person who was a person who was a person

he was carrying all of the money in another man located in the City

located at Chicago. The City, located by the City, located.

was moving south on the west side of Central avenue, and approaching Potomac avenue, an east and west street, at a speed of about 15 miles an hour. It was and had been snowing. Just north of Potomac avenue on the west side of Central avenue, there was a large hole in the pavement (not known to be there by either the chauffeur or plaintiff), about seven feet long and extending from near the west curb towards the center of the street, about five feet wide and about one foot deep. The hole was partially or wholly filled with light snow and was not observable to the chauffeur. Suddenly one or more of the wheels of the cab went into the hole and plaintiff's head, upon the rebound, struck the roof of the cab with such force as to render him unconscious for several minutes. Upon his regaining consciousness he directed the chauffeur to continue on the journey and all the money finally was delivered at said downtown bank. Thereafter plaintiff was taken to a hospital and the evidence disclosed that as a result of the accident he was seriously and permanently injured. The evidence further disclosed that the City either knew or had constructive notice of the existence of the dangerous hole. Several of plaintiff's witnesses testified to the effect that it had been there for five or six months without anything having been done by the City to repair the hole or remove the manifest danger to vehicles and persons traveling therein.

The main grounds for a reversal of the judgment, as urged by counsel for the City, are (1) that plaintiff was guilty of such contributory negligence as bars any recovery by him; (2) that the City was not shown to have been guilty of any negligence proximately causing plaintiff's injuries; and (3) that the damages awarded by the jury are excessive. No useful purpose will be served in discussing these several contentions. Suffice it to say that we have carefully con-

was having lunch on the west side of Broadway Avenue, and approaching
bicycle stand, he took the seat nearest to the stand in which
on foot. It was not long before the bicycle was taken
on the west side of Broadway Avenue, and he was taken to the
ground level where he was taken to the ground level in which
about seven foot long and extending from the west side of the
the corner of the street, about five feet wide and about one foot deep.
The hole was partially or wholly filled with bricks and was not
observable to the character. Whether one or more of the bricks at the
and went into the hole and Glavin's head was taken, and
the west of the hole with some force and to render his investigation for
several minutes. Upon his returning consciousness he located the
character in position on the ground and all the money finally was
delivered as well down from him. Thereafter Glavin was taken to
a hospital and the witness discussed him as a result of the accident
he was seriously and permanently injured. The witness further dis-
closed that the City either knew or had constructive notice of the
existence of the dangerous hole. Several of Glavin's witnesses
testified to the effect that he had been warned for five or six months
without anything having been done by the City to repair the hole or
remove the smallest danger to vehicles and persons traveling there.
The main grounds for a reversal of the judgment, as urged
by counsel for the City, are (1) that Glavin's was a failure of law
continuously negligent on the part of the City, and (2) that the City
was not shown to have been negligent in its negligence in causing the
Glavin's injuries; and (3) that the damages suffered by the City are
excessive. No useful purpose will be served by discussing these
several contentions, unless it be said that we have previously con-

sidered all of them and are of the opinion that they are lacking in substantial merit.

Complaint is made of the giving of two instructions offered by plaintiff, and of the refusal to give one instruction offered by the City. We do not think that any error was committed by the court in any of these particulars. The jury were fully and fairly instructed. Nor do we think that the court committed any reversible error in allowing plaintiff's expert witness, Dr. Greenspan, to answer certain hypothetical questions asked of him, as contended by counsel.

Finding no reversible error in the record the judgment of the Superior court is affirmed.

AFFIRMED.

Scanlan and Barnes, JJ., concur.

elaborated all of them and one of the editors said they are leaving in
substantial merit.

Changing is made of the giving of the investigation officer

of discipline, and of the interest in the investigation officer of

the ship. We do not think that any error was committed by the ship

in any of these particulars. The facts were fairly and fairly handled.

and we do not think that the court committed any reversible error in this

and the district's expert witness. In conclusion, we agree with

the district's expert witness, as indicated by counsel.

finding no reversible error in the record the judgment is

the judgment is affirmed.

REVEREND

Justice and Justice, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000

249 I.A. 652²

32437

LEO A. BURN,
Appellee,

v.

W. E. SCHOFIELD,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE CHILLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for \$2,465 entered against defendant in the Municipal court of Chicago on October 4, 1927, in a first class action in contract tried without a jury.

In his statement of claim plaintiff alleged that on or about June 5, 1925, he made a verbal agreement with defendant, a real estate broker in Chicago, to the effect that, if plaintiff would place the Stratford Hotel (owned by A. S. Hayes and located at 4131 Sheridan Road, Chicago,) for sale with him, he (defendant), if successful in selling the hotel, would pay plaintiff one-half of the commissions received from the sale; that plaintiff assisted in the sale of the hotel, which was consummated on or about July 11, 1925, to Bevard, List & Fowers; that defendant received \$5,000 as commissions, and paid plaintiff \$35 on account of his half thereof; and that there is due to plaintiff from defendant the net sum of \$2465.

In defendant's affidavit of merits, sworn to by one of his attorneys, he denied that either on June 5, 1925, or at any other time, he made any such verbal agreement as plaintiff alleges; denied that he at any time discussed with plaintiff the paying to plaintiff of any portion of any commission earned or to be earned from the sale of the hotel; denied that plaintiff placed the hotel

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with him for sale or that plaintiff assisted in any way in the sale; alleged that defendant alone consummated the sale; admitted that he had received \$6,000 as commissions therefor from said Hayes; denied that he ever had paid to plaintiff anything on account of commissions, but alleged that on two occasions early in July, 1925, he loaned money, aggregating \$35, to plaintiff, which the latter has not repaid; and further alleged that "the sole interest of plaintiff in the sale of the hotel from Hayes to Bevard, List & Powers was the hope that he (plaintiff) might obtain a position as manager thereof after such sale," and that plaintiff did obtain such position as manager by reason of defendant's efforts and assistance.

Upon the trial plaintiff testified in his own behalf and Hayes, the seller of the hotel, was called as a witness by him. Plaintiff also introduced in evidence certain letters written to him in June and July, 1925, prior to the consummation of the sale of the hotel, by H. W. Powers, who was one of the three purchasers and who then resided at Madison, Wisconsin. Defendant was the only witness testifying for him. He also introduced certain letters written to him by said Powers during June, 1925.

The evidence discloses that plaintiff was in the business of acting as manager for hotels; that in June, 1925, and for several months prior thereto, he was out of his usual employment and was living at the Stratford Hotel, Chicago; that he was acquainted with Hayes and knew that Hayes wanted to sell said hotel; that during the spring of 1925 he and certain other parties had negotiations with Hayes looking to the purchase by them of the hotel; and that nothing resulted from these negotiations, but Hayes had given plaintiff authority to list the hotel and endeavor to find a purchaser therefor. Defendant was and had been for many years a licensed real

estate broker in Chicago, making a specialty of buying and selling hotels for his clients. In June, 1925, Messrs. Bevard, List & Powers were the operators of the Park Hotel at Madison, Wisconsin, and were in the market for the purchase of other hotels elsewhere. H. W. Powers was their representative in the negotiations conducted as hereinafter mentioned. About June 1, 1925, plaintiff called on defendant, informed him that the Stratford Hotel was for sale and solicited his assistance in finding a purchaser therefor. Defendant became interested and asked for figures and full details. These were furnished to him by plaintiff, he procuring them from Hayes. According to plaintiff's testimony, defendant then said to plaintiff that if he succeeded in consummating a sale of the hotel he would pay plaintiff one-half of the commissions received. Defendant strenuously denied that he made any such verbal agreement with plaintiff, or that he promised to pay to plaintiff any portion of any commissions he might receive. Only the two parties were present at this interview. The evidence further discloses that negotiations were taken up by both plaintiff and defendant with H. W. Powers of Madison, Wisconsin, and strenuous efforts made by both to get the firm of Bevard, List & Powers to buy the hotel. During the progress of these negotiations Powers wrote several letters to plaintiff, individually, which plaintiff showed to defendant. Powers also wrote several letters to defendant. According to defendant's testimony plaintiff's activity in the negotiations was caused solely by his hope that if the Powers firm finally purchased the hotel he (plaintiff) would be employed by it as manager of the hotel. Finally, as the result of the negotiations of both plaintiff and defendant the sale of the hotel was consummated on July 11, 1925. A few days afterwards Hayes, by check, paid \$5,000 as commissions to defendant. Hayes

testified that at this time he inquired of defendant whether he should make two checks for the commissions, - one to plaintiff for \$2500 and the other to defendant for the same amount; and that defendant replied: "Make it all to me; * * I will fix it up with Mr. Burr." On the same or the following day plaintiff saw defendant and asked for one-half of the commissions. Defendant said he would give him \$500 for his share, but plaintiff replied that he wanted \$2500, according to the agreement, less the \$35 which defendant had previously paid him. Defendant made no further payment to plaintiff and thereafter the present action was begun.

Defendant's counsel contend that the judgment should be reversed because plaintiff did not show by a preponderance of the evidence that defendant agreed to pay plaintiff one-half, or any other portion, of the commissions in case the sale was consummated. The argument is that plaintiff's testimony that such an agreement was made was flatly contradicted by that of defendant; that both witnesses were equally credible; and that the circumstances surrounding the transaction and sale do not tend to support plaintiff's testimony. We cannot agree with the contention or the argument, and are not disposed to disturb the finding or judgment. The court saw and heard both plaintiff and defendant testify, observed their demeanor, and was in the better position to determine which was telling the truth. Furthermore, some of the circumstances shown by the evidence tend to substantiate plaintiff's testimony. We cannot think that plaintiff's great activity in assisting in the negotiations which finally brought about the sale of the hotel, was occasioned solely by the hope that, in case the firm with which Powers was

connected finally bought the hotel, he (plaintiff) would obtain the position of manager thereof.

The judgment of the Municipal court should be affirmed and it is so ordered.

AFFIRMED.

Scanlan, J., concurs;
Barnes, J., dissents.

THESE THINGS BEING DONE BY THE PEOPLE OF THE COUNTRY

THE PEOPLE OF THE COUNTRY

THE PEOPLE OF THE COUNTRY

THE PEOPLE OF THE COUNTRY

THE PEOPLE OF THE COUNTRY

32460

HANS SCHENCKE,
Appellee.

v.

GLOBE PAPER BOX CO.,
a corporation,
Appellant.

249 I.A. 652³

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In a first class action in contract, commenced November 3, 1926, and tried without a jury in September, 1927, the court found the issues in plaintiff's favor on his statement of claim and against defendant on its set-off, and assessed plaintiff's damages at \$1450.56. Judgment was entered upon the finding against defendant and this appeal followed.

In his statement of claim plaintiff alleged that defendant was indebted to him in the sum of \$3,000 for salary earned while an employee of defendant during the year 1926. He admitted that he was indebted to defendant in the sum of \$1549.44, for moneys loaned to him, leaving a net balance due him of \$1450.56.

In defendant's affidavit of merits it denied that it owed plaintiff any sum for salary or otherwise, and alleged that plaintiff in 1926 was employed by defendant at a salary of \$100 a week which had been paid to him. Defendant's amended claim of set-off was to the effect that plaintiff was indebted to it in the total sum of \$2,149.44, - made up of \$1549.44, for moneys loaned to plaintiff as admitted in his statement of claim, and of \$600, "wrongfully withdrawn" by plaintiff from defendant and paid to one Anna Eusen, without defendant's knowledge or consent.

2401A.22

IN REPLY TO

STATE DEPARTMENT
WASHINGTON, D.C.
JAN 10 1950

MR. JEROME L. LEVINE, CHIEF, FEDERAL BUREAU OF INVESTIGATION, U.S. DEPARTMENT OF JUSTICE

In a letter dated in Washington, D.C., December 15, 1949, you advised that you had received a letter from the Federal Bureau of Investigation, dated December 10, 1949, in which it was stated that the Bureau was conducting an investigation of the activities of the American Friends Service Committee (AFSC) in connection with the activities of the AFSC in the United States and abroad. The letter also stated that the Bureau was interested in the activities of the AFSC in connection with the activities of the AFSC in the United States and abroad.

In the statement of the AFSC, it was stated that the AFSC was a non-profit organization which was organized in 1917 for the purpose of promoting peace and understanding between the peoples of the world. The AFSC was organized by a group of people who were concerned about the activities of the AFSC in the United States and abroad. The AFSC was organized for the purpose of promoting peace and understanding between the peoples of the world.

In the statement of the AFSC, it was also stated that the AFSC was a non-profit organization which was organized in 1917 for the purpose of promoting peace and understanding between the peoples of the world. The AFSC was organized by a group of people who were concerned about the activities of the AFSC in the United States and abroad. The AFSC was organized for the purpose of promoting peace and understanding between the peoples of the world.

Defendant is an Illinois corporation engaged in the business of manufacturing and selling paper boxes. Its principal office and factory are located in Chicago. About the year 1918 plaintiff purchased an interest in the company and was elected its president. Subsequently he acquired one-third of its capital stock - the other two-thirds being owned (1/3rd each) by A. I. Gidwitz and Michael Gidwitz. Plaintiff continued to act as president and A. I. Gidwitz acted as secretary and treasurer of the company. Plaintiff, A. I. Gidwitz and Michael Gidwitz constituted the board of directors. By a by-law of the company it was provided that the officers should be elected "for a term of one year" and should hold office until their successors were duly elected and qualified. By another by-law it was provided that "the directors shall elect the officers of the corporation and fix their salaries, such election to be held at the directors' meeting following each annual stockholders' meeting." At the regular meeting of the board of directors, held on January 7, 1924, following the annual meeting of the stockholders, the three directors were present and plaintiff again was elected president of the company and A. I. Gidwitz secretary and treasurer, and each of these two officers was voted a salary of "\$10,000 per annum for the year 1924." At the regular meeting of the directors held on January 5, 1925, these two officers were re-elected and each was voted a salary of "\$10,000 per annum for the year 1925." Before the time arrived for holding the annual meeting in January, 1926, the business relations existing between plaintiff and the ^{two} Gidwitz had become strained. The same three directors were elected at the stockholders' meeting. When these directors met on January 4, 1926,

...in an attempt to obtain evidence in the
business of manufacturing and selling paper boxes. The principal
offices and factory are located in Chicago. About the year 1928
plaintiff purchased an interest in the company and was elected its
president. Subsequently he acquired ownership of the capital
stock - the other two-thirds being owned (1/3rd each) by J. I.
Bisbee and Michael Bisbee. Plaintiff continued to act as president
and J. I. Bisbee acted as secretary and treasurer of the company.
Plaintiff, J. I. Bisbee and Michael Bisbee constituted the board
of directors. By a by-law of the company it was provided that the
directors should be elected "for a term of one year and unless such
directors until their successors were duly elected and qualified. By
another by-law it was provided that "the directors shall elect one
officer of the corporation and two other officers, each election to
be held at the directors' meeting following each annual shareholders'
meeting." At the regular meeting of the board of directors, held on
January 7, 1934, following the annual meeting of the shareholders,
the three directors were present and Plaintiff alone was elected
president of the company and J. I. Bisbee secretary and treasurer;
and each of these two officers was voted a salary of \$10,000 per
year for the year 1934." At the regular meeting of the directors
held on January 8, 1935, these two officers were re-elected and each
was voted a salary of \$10,000 per annum for the year 1935. Before
the time arrived for holding the annual meeting in January, 1936,
the business relations existing between Plaintiff and the two
and became strained. The same three directors were elected at the
shareholders' meeting, held on January 4, 1936.

plaintiff again was elected president and A. I. Gidwitz secretary and treasurer, but a controversy developed as to the amount of salary which should be paid to them respectively for the year 1936. Plaintiff wanted an increase in his salary over the \$10,000 per annum previously paid, but insisted that A. I. Gidwitz's salary be decreased. Michael Gidwitz desired that the salaries of both plaintiff and A. I. Gidwitz be decreased. No agreement was reached. Before the meeting adjourned, upon the suggestion of Michael Gidwitz, it was agreed that pending a settlement of the controversy plaintiff and A. I. Gidwitz each should draw as a salary the sum of \$100 a week. The record of this meeting, introduced in evidence, discloses that the meeting adjourned "to be called by the president in the immediate future at a mutually convenient date." The president (plaintiff) did not call such meeting, but he, together with his personal attorney, and A. I. Gidwitz and Michael Gidwitz, met in February, 1936, in the office of the attorney of the company, and the controversy over the salaries to be paid said officers was resumed, but no agreement was reached. Thereafter and until about August 1, 1936, when plaintiff resigned as president of the company, he continued to draw from the company's funds the sum of \$100 a week, for about 30 weeks, aggregating \$3000. The same weekly amount was drawn out by A. I. Gidwitz. Prior to plaintiff's resignation the board of directors did not, by resolution or otherwise, fix plaintiff's salary as president for the year 1936 at any figure. The weekly withdrawals of \$100 were, however, consented to by both of the ^{two} Gidwitz. When plaintiff resigned as president he took the position that, in addition to the \$100 a week received, aggregating about \$3,000, he was entitled to be paid on account of salary \$3,000 more, for said portion of the year 1936. He contended in the trial court in substance, and here contends, that, inasmuch as

plaintiff again was elected president and A. I. Thibault was elected
vice president, and a controversy developed as to the amount of salary
which should be paid to them respectively for the year 1938. Thibault
first asked an increase in his salary over the \$10,000 per annum paid
plaintiff, but insisted that A. I. Thibault's salary be increased.
Thibault insisted that the salaries of both plaintiff and A. I.
should be decreased. No agreement was reached, and the matter
remained, upon the suggestion of Michael Thibault, as an agreed case
pending a settlement of the controversy plaintiff and A. I. Thibault.
Each asked that a salary the sum of \$100 a week. The record at
this meeting, introduced in evidence, discloses that the meeting was
terminated "to be called by the president in the immediate future at a
regularly convened date." The minutes (plaintiff's) do not call
such meeting, but do, together with his personal attorney, and A. I.
Olivier and Michael Thibault, on February 19, 1938, in the office of
the attorney of the company, and the controversy over the salaries of
the said officers was resumed, but no agreement was reached.
Thibault and Thibault again about 1, 1938, when plaintiff resigned
as president of the company, he continued to draw from the company's
treasury the sum of \$100 a week, for about 10 weeks, approximately \$1,000.
The same weekly amount was drawn out by A. I. Thibault. When he
plaintiff's resignation the board of directors did not, by resolution
or otherwise, fix plaintiff's salary as president for the year 1938
at any figure. The weekly allowance of \$100 was, however, con-
tinued in by both of the ^{two} directors. When plaintiff resigned as president
he took the position that, in addition to the \$100 a week allowed,
approximately \$1,000, he was entitled to as well as payment of
salary for the year 1938. The same amount was drawn out by Thibault
in the trial court in substance, and now contended, that in addition to

he was re-elected president of the company for the year 1926, and his salary for that year had not definitely been fixed by the board of directors, and his salary for the two preceding years had been \$10,000 a year, he so to speak, "held over," and was entitled to a salary at that rate for the portion of the year 1926, ending August 1, 1926.

Under the facts disclosed we are unable to agree with the contention, and we think that the trial court erred in allowing him \$3,000, as a balance due for salary, and in entering the judgment appealed from. In Ellis v. Ward, 137 Ill. 509, 518, it is said: "The doctrine is well settled in this court, that the law will not imply a promise on the part of a private corporation to pay its officers for the performance of their usual duties. In order that such officers may legally demand and recover for such services, or the corporation legally make allowance and payment therefor, it must appear that a by-law or resolution had been adopted authorizing and fixing such allowance before the services were rendered." (See, also, Merrick v. Peru Coal Co., 61 id. 472, 480; Moschill Cemetery Co. v. Dempster, 223 id. 567, 576.) In the present case it appears that by defendant's by-laws it was provided that all officers (including the president) should be elected for the term of one year and that their salaries should be fixed each year by the board of directors; that by resolution of the board of directors plaintiff's salary as president was fixed at \$10,000 for the year 1924, and at the same amount for the year 1925; that a controversy arose in the board about January 1, 1926, as to what salary should be paid him for the year 1926; that pending a settlement of this controversy it was agreed that he should draw \$100 a week on account of salary; that the controversy was not settled and the board did not at any time definitely fix his

be not re-elected president of the company for the year 1936, and his salary for that year had not definitely been fixed by the board of directors, and his salary for the two preceding years had been \$10,000 a year, he so to speak, "held over," and was entitled to a salary of that rate for the portion of the year 1936, ending August 1, 1936.

Under the facts disclosed we are unable to agree with the conclusion, and we think that the trial court acted in allowing him \$10,000, as a balance due for salary, and in entering the judgment against him. In Hill v. Hill, 137 Ill. App. 2d, 312, it is said: "The doctrine is well settled in this court, that the law will not imply a promise on the part of a private corporation to pay its officers for the performance of their legal duties, in order that such officers may legally demand and recover for such services, or the corporation legally make allowance and payment therefor. It must appear that a promise or obligation has been accepted, established and binding upon the corporation before the services were rendered." (Emphasis added.)

Domestic v. First Nat. Bk., 41 Ill. App. 2d, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

salary for said year 1926; and that until his resignation as president about August 1, 1926, plaintiff received and accepted said \$100 a week on account of salary. And we are of the opinion that, because of defendant's claim of set-off, and plaintiff's admission in his statement of claim that he owed defendant for money loaned to him the sum of \$1549.44, the court should have entered judgment against plaintiff and in favor of defendant for said sum of \$1549.44.

But, under the facts in evidence, we do not think that defendant is entitled to recover from plaintiff the additional sum of \$600 which plaintiff, as defendant's president, about August 1, 1926, caused to be paid to Anna Buson out of defendant's funds on account of salary which she claimed to be due her. For many years she had been a trusted employee of defendant. Each year she had been paid a weekly salary and in addition at the end of each year, on account of salary, a lump sum, agreed to by all directors. Following the custom plaintiff, early in January, 1926, agreed with her that she should be paid as salary, in addition to the usual weekly payments made to her, \$1,000, for her services during said year. She left defendant's employ about the same time that plaintiff resigned as president, and the payment of \$600 made to her was the pro rata amount to which she was entitled under said agreement. We find nothing in the evidence tending to show that this sum was "wrongfully withdrawn" from defendant's funds by plaintiff, as charged in defendant's claim of set-off, or that plaintiff in making said payment or Anna Buson in receiving it, was guilty of any fraud. We think it clear from the evidence, and from the provisions of the by-laws of defendant as to the powers and duties of the president of the company that

plaintiff had authority as president to make the agreement with her that he did, and to make the payment to her in accordance therewith.

For the reasons indicated the judgment of the Municipal court is reversed and judgment will be entered here for \$1549.44 against plaintiff, Hans Schwenneke, and in favor of defendant, Globe Paper Box Co.

REVERSED AND JUDGMENT HERE AGAINST
PLAINTIFF FOR \$1549.44.

Scanlan and Barnes, JJ., concur.

claiming that the company is not in the business of selling
the oil, and is not in the business of selling the oil.
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THE COMPANY CLAIMS THAT THE COMPANY IS NOT IN THE BUSINESS OF
SELLING THE OIL, AND IS NOT IN THE BUSINESS OF SELLING THE OIL.

32460

FINDING OF FACTS.

We find as facts in this case that the defendant company, Globe Paper Box Co., did not by resolution of its board of directors, or otherwise, fix plaintiff's salary, as president of said company for the year 1926, at the sum of \$10,000, or any other sum; that plaintiff, during the portion of said year that he acted as president of defendant, received in weekly payments such amounts, viz, \$100, on account of salary as had verbally been agreed upon by all directors; and that defendant is not indebted to plaintiff in any sum on account of salary as such president.

1880

RECORD OF THE

IN THE YEAR 1880, THE FIRST OF JANUARY, THE BALANCE
WAS \$100,000.00, AND THE BALANCE ON THE 31ST OF
DECEMBER, 1880, WAS \$100,000.00. THE BALANCE
ON THE 31ST OF JANUARY, 1881, WAS \$100,000.00.
THE BALANCE ON THE 31ST OF FEBRUARY, 1881, WAS
\$100,000.00. THE BALANCE ON THE 31ST OF MARCH,
1881, WAS \$100,000.00. THE BALANCE ON THE 31ST
OF APRIL, 1881, WAS \$100,000.00. THE BALANCE
ON THE 31ST OF MAY, 1881, WAS \$100,000.00.
THE BALANCE ON THE 31ST OF JUNE, 1881, WAS
\$100,000.00. THE BALANCE ON THE 31ST OF JULY,
1881, WAS \$100,000.00. THE BALANCE ON THE 31ST
OF AUGUST, 1881, WAS \$100,000.00. THE BALANCE
ON THE 31ST OF SEPTEMBER, 1881, WAS \$100,000.00.
THE BALANCE ON THE 31ST OF OCTOBER, 1881, WAS
\$100,000.00. THE BALANCE ON THE 31ST OF NOVEMBER,
1881, WAS \$100,000.00. THE BALANCE ON THE 31ST
OF DECEMBER, 1881, WAS \$100,000.00.

32460

ARTHUR W. BAHR,
Plaintiff in Error,

v.

ALFON E. BAHR and ALFON E.
BAHR & CO., a corporation,
Defendants in Error.

249 I.A. 652

ERROR TO CIRCUIT COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE BRIDLEY DELIVERED THE OPINION OF THE COURT.

By this writ of error it is sought to reverse a decree of the Circuit court of Cook county, entered June 21, 1926, wherein the court, contrary to the recommendation of the master, ordered that complainant's bill as amended be dismissed for want of equity at his costs.

Complainant's original verified bill for an accounting, etc., was filed against Alfon E. Bahr, his older brother, as sole defendant, on January 28, 1924. After defendant had filed his answer, complainant caused "Alfon E. Bahr & Co., a corporation," to be made an additional party defendant, and he also made certain amendments to his bill having particular reference to said corporation, which he claimed had been duly organized and doing business as such. Defendant, in his answer to the amendment to the bill, while admitting that on March 26, 1918, the Secretary of State of Illinois had issued a certificate of organization of a corporation of that name with capital stock of \$2500, denied that said corporation had ever completely been organized (in that said certificate had never been filed in the office of the recorder of Cook county), or had ever transacted any business, or that any of defendant's business as a

250. A. T. 42

Page

ARTICLE 1. 1900.

1.

ALICE T. BROWN and ALICE T. BROWN & CO., INCORPORATED, DEFENDANTS IN ERROR.

ALICE T. BROWN and ALICE T. BROWN & CO., INCORPORATED, DEFENDANTS IN ERROR.

THE COURT OF COMMONS, NEW YORK, in the case of the above entitled matter, do hereby certify that the following is the result of the trial of the case.

By this will be given it is ordered by the Court of Common Pleas, New York, in the case of the above entitled matter, do hereby certify that the following is the result of the trial of the case.

Complainant's original verified bill for an accounting, etc., was filed against Alice T. Brown, his sister brother, as well as against Alice T. Brown & Co., Inc., a corporation, on January 22, 1904. After defendant had filed his answer, complainant moved for a decree of specific performance.

It was made an additional party defendant, and he also was made

defendant in his bill having particular reference to said corporation,

which he claimed had been only organized and doing business as such.

Defendant, in his answer to the complaint to the bill, which was filed

that on March 22, 1904, the necessary of State of Illinois was issued

a certificate of organization of a corporation of the name with

capital stock of \$1000, named that said corporation had ever

formerly been organized (in the said certificate and never been

filed in the office of the clerk of said county), or had ever

transacted any business, or had any of defendant's business as a

general insurance broker had ever been turned over to it. The main issue, as disclosed from the pleadings, was whether or not complainant was entitled to an accounting from defendant. On October 4, 1924, the cause was referred to a master in chancery to take testimony on that question, and to report the same, together with his conclusions of fact and law. Such evidence, oral and documentary, was introduced before the master, and on March 23, 1926, he filed his report, wherein, after making numerous findings, he concluded that "complainant is entitled to an accounting, as against the defendant, on the basis as shown by their testimony of the division of the profits to the time of an incorporation of said company, and from said time on the basis of two-twenty-fifths ($2/25$ ths) of the business done by Alfon B. Bahr & Co." Upon the hearing upon exceptions the court, in view of the allegations of complainant's verified bill as amended and the evidence, was of the opinion that complainant was not entitled to an accounting, and entered the decree complained of.

A few days before the entry of the decree complainant made a motion, supported by his affidavit, that he be allowed to file an "amended and engrossed bill of complaint." The court denied the motion. The proposed amended bill, together with complainant's affidavit in support of his motion, are shown in a certificate of evidence contained in the transcript.

In the original bill complainant alleged that on June 1, 1916, he entered into a verbal contract of partnership with defendant for the purpose of doing a general insurance brokerage business; that by its terms the name of the partnership was to be Alfon B. Bahr & Co.; that complainant was to have 50 per cent net of all

General Insurance Broker had been known ever to it. The
main issue, as discussed from the findings, was whether or not
complaint was entitled to an accounting from defendant. On
October 4, 1934, the same was referred to a master in equity to
make findings on the facts and to report the same. Defendant
with his testimony of fact and law. Both parties, each and
separately, was introduced before the master, and on March 12, 1935,
he filed his report, wherein, after making numerous findings, he
concluded that "complaint is entitled to an accounting, as against
the defendant, on the basis as shown by their testimony of this
testimony of the parties to the time of the incorporation of said
company, and from and since on the basis of the books of the company (L/1934)
of the defendant done by L/1934, Item 3, 1934." Upon the finding upon
everywhere the court, in view of the findings of complaint's
verified bill on amended and the evidence, was of the opinion that
complaint was not entitled to an accounting, and that the same
complaint as a
A few days before the entry of the above judgment made
a motion, supported by his affidavit, that he be allowed to file an
"amended and enlarged bill of complaint." The court denied the
motion. The proposed amended bill, together with complaint's
affidavit in support of his motion, are shown in a certificate
of evidence contained in the transcript.
In the written bill of complaint signed and on June 1,
1935, he ordered that a further account of plaintiff's bill be
for the purpose of filing a general account of plaintiff's bill.
that by its terms the name of the partnership is to be taken to
John & Co. that complaint was to have 25 per cent of all

commissions earned and paid to the firm where the lead or prospect which resulted in the earning of commissions was furnished to complainant by defendant and the business was obtained through the efforts of complainant; that on all business secured by complainant, where no leads or prospects were given to him, he was to receive 100 per cent of the commissions, less a deduction to apply on the overhead expense; that in addition to these commissions complainant was to have an interest in the general business transacted by the firm, "but the exact amount of said interest was not agreed upon;" that complainant was to receive as a drawing account \$60 per month, which thereafter was increased, first to \$90 per month, and then to \$300 per month by mutual consent; that no time for the termination of the partnership was agreed upon; and that after entering into this agreement complainant and defendant continued to transact business thereunder until November 26, 1923, when defendant announced that complainant was but an employe of his and had no interest in the business, and discharged him, since which time he has not taken any part therein.

Complainant further alleged in said bill that, although he had repeatedly requested defendant to agree with him as to the proportion of the profits of the business he should receive for his general activity therein, "defendant would always promise to agree, but would always delay in so doing, and at no time came to a final understanding with complainant in relation thereto."

The bill prayed that the verbal contract be terminated, that a receiver for the business be appointed, that an accounting be had, that the assets be divided according to the respective interests of the parties, and that an injunction be issued restraining defendant from preventing complainant from entering upon the premises where said business was being conducted and examining the books and

complaints entered and said to the fact that the fact of progress
which resulted in the coming of complaints was limited to one
claimant of defendant and the business was limited to one
attorney at law; that in all business records of complaints,
where the facts or progress were given in this, he was to receive 100
per cent of the commission. The defendant was again in the state
and expected that in addition to the business complaints and
to have an interest in the general business conducted by the firm.
"But the exact amount of said bill was not agreed upon, that
complaint was to receive as a business account for the month, which
thereafter was increased, first to 100 per month, and then to 150
per month by mutual consent; that the fact of the business of the
partnership was agreed upon and that after entering into this agree-
ment complaint and defendant continued to conduct business in the
month until November 22, 1913, when defendant announced that com-
plaint was not an employee of him and had no interest in the business,
and absconded with him, since which time he has not been in contact
with him. Complaint further alleged in said bill, although
he has repeatedly requested defendant to agree with him as to the
proportion of the profits of the business he should receive for his
general actively business, "defendant would always refuse to agree,
but would always delay in so doing, and as the time is a long
period of time the initial bill was made."

The bill was made and the initial amount was determined,
and a receiver for the business was appointed, and on December 10
and, that the same be placed in the hands of the receiver and
of the parties, and that no interest be paid to the parties.
From the foregoing recitation of the facts and circumstances
said business was being conducted and continuing the same was

records of the business. It does not appear that any injunction was issued or receiver appointed.

In defendant's answer to the bill he denied entering into any partnership agreement or arrangement with complainant at any time, and alleged that the relationship existing between him and complainant was that of employer and employee; alleged that he did agree to pay complainant 50 per cent net of all commissions earned and paid to him (defendant, trading as Alton E. Bahr & Co.) where the lead or prospect which resulted in the payment of said commissions was furnished by him and the business was obtained through the efforts of complainant, and further agreed to pay complainant the entire commissions on all business procured by complainant through his own efforts and without said leads, less 5 per cent for overhead expenses; denied that complainant was to receive anything additional and to have any other interest in the business; and alleged that all commissions and salaries agreed to be paid to complainant had been paid and that nothing was due to complainant.

On the hearing before the master, plaintiff's testimony was practically the only evidence received on the question whether a partnership had at any time existed between the parties prior to November 26, 1923, when complainant severed all business relations with defendant. While his testimony disclosed that at various times, in June, 1916, in the fall of 1918, in the spring of 1919, and in the spring of 1923, various negotiations were had between the parties as to a possible partnership, it also disclosed that no definite partnership agreement was ever made between them. As illustrative of this, his testimony as to the conversation or negotiations had in the fall of 1918, may be mentioned, viz: "He (defendant) said the business which was indicated on the books with my name, the premiums which

...of the business. It was not until 1911 that the business
was found to be in a state of liquidation.

The defendant's answer to the bill in liquidation of the
partnership agreement or arrangement with complaint of 1911
time, and alleged that the relationship existing between him and
plaintiff was that of employer and employee, and that he did
not agree to pay compensation to plaintiff for his services as such
and paid to him (defendant), including an Allen A. Allen A. Co., where
the last or proposed which resulted in the payment of said compensation
was obtained by him and the business was obtained through the efforts
of defendant, and further asked to pay compensation for the entire
period from all business proceeds by complaint of 1911. He also
alleged that plaintiff was to receive certain commissions and to have
an equal interest in the business; and alleged that all commissions
and salaries agreed to be paid to plaintiff had been paid and that
plaintiff was not to be compensated.

On the hearing before the master, plaintiff's testimony
was accepted and the only evidence received on the matter was that
plaintiff had a very close relationship between the parties prior to
November 22, 1911, when defendant received all business relations
with plaintiff. While his testimony was taken at a certain time,
in June, 1912, in the fall of 1911, in the spring of 1912, and in the
spring of 1913, various negotiations were had between the parties as
to a possible partnership, it was disclosed that no definite partnership
agreement was ever made between them. In this respect of this
his testimony, as to the conversations or negotiations had in the fall
of 1912, may be mentioned, viz: "The defendant" said the business
which was located on the back of the house, the premises which

that totalled, compared to the business that was marked D. T., or Direct, would be the particular percentage of my interest in the business of Alfon E. Bahr & Co. to his. We discussed the matter at length. He spoke about his expenses which should be carried by the business, and I could not agree with him as to his proposition and the amount of his expenses, and, therefore, * * nothing was put in writing at that time." Furthermore, the testimony of defendant, corroborated in some particulars by that of other witnesses called by him, clearly showed that no agreement for a partnership between the parties upon any basis ever was made. Furthermore, certain documentary evidence introduced by defendant discloses that neither party, prior to November, 1923, considered that a partnership relation existed, viz: (1) certain agreements signed by "Alfon E. Bahr, doing business as Alfon E. Bahr & Co."; (2) accounts of Alfon E. Bahr & Co., showing complainant as an employee thereof; (3) income tax returns filed separately by each party as an individual.

After a somewhat careful review of the evidence we are of the opinion that no partnership ever existed between the parties, that complainant was not entitled to any accounting from defendant or from the claimed corporation of Alfon E. Bahr & Co., and that the court's action in dismissing complainant's bill for want of equity at his costs was fully justified. Complainant clearly is not entitled to any accounting as an employee. His bill as amended does not seek such relief as an employee, and the evidence does not sufficiently disclose that anything is due him either for salary or commissions. And we do not think that the court erred in denying complainant's motion, made on the eve of the entry of decree complained of, for leave to file a further amended and engrossed bill. This was a matter resting in

the sound discretion of the court. (Wtruvs v. Tatge, 285 Ill. 103, 113), and after perusing the proposed amended bill we cannot say that there was any abuse of the court's discretion.

The decree of the Circuit court should be affirmed and it is so ordered.

AFFIRMED.

Scanlan and Barnes, JJ., concur.

32490

CARL H. HOPER,
Defendant in Error.

v.

SPRINGFIELD FIRE & MARINE
INSURANCE CO.,
Plaintiff in Error.

249 T.A. 652

ERROR TO SUPERIOR COURT,
COOK COUNTY.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

The judgment under review was rendered in an action brought upon a policy of insurance indemnifying plaintiff against loss of his automobile by theft.

The grounds for reversal are (1) an alleged variance; (2) insufficiency of the declaration to support the cause of action; (3) failure of plaintiff to comply with the condition precedent to render a sworn statement in proof of loss within sixty days after the time of the loss complained of, and (4) that the judgment and verdict are excessive.

We do not think any of these grounds is well taken.

The points made as to a variance were that the policy was not an unqualified insurance against theft, and that the declaration contained no allegation that the policy contained any condition precedent, such as appeared in the policy offered in evidence. As to the first point neither the declaration nor proof produced to support it proceeded upon the theory that there was no condition of liability; and as to the second it is sufficient to say that the declaration purported merely to set forth the substance of the policy or contract and averred generally performance and compliance with all of its conditions. It constitutes no basis for the

2401.052

0490

THE COURT OF APPEALS
IN THE DISTRICT OF COLUMBIA

EXHIBIT NO. 1
IN THE CASE OF
THE UNITED STATES OF AMERICA
VS.
JAMES EARL RAY
A. J. 100-100000-100000
EXHIBIT NO. 1

THE UNITED STATES OF AMERICA, Plaintiff,
vs.
JAMES EARL RAY, Defendant.

The judgment under review was rendered in an action
brought upon a policy of insurance insuring against
loss of his automobile by theft.

The grounds for reversal are (1) an alleged
(A) Inadequacy of the decision to support the cause of action;
(B) Failure of plaintiff to comply with the condition precedent to
recovery a sworn statement in favor of loss within thirty days after
the time of the loss complained of, and (C) that the judgment was
reversed and annulled.

It is not likely that any of these grounds is well taken.
The points made as to a variance were that the policy
was not as described in the complaint against theft, and that the decision
remained no allegation that the policy contained any condition
precedent, such as appears in the policy offered in evidence. As
to the first point whether the decision was based upon the
evidence it presented upon the theory that there was no condition of
liability; and as to the second it is not likely to say that the
decision purported merely to set aside the substance of the
policy or contract and award generally performance and compliance
with all of the conditions. It constitutes no basis for the

argument that it did not attempt to set out the specific conditions of the policy. The terms and conditions of the contract need not be specifically set out, if they are set forth in substance. The very cases relied upon by plaintiff in error, namely, Rockford Ins. Co. v. Nelson, 65 Ill. 415, and Feder v. Maryland Casualty Co., 315 id. 552, so hold. These cases, however, are readily differentiated from the case at bar both with respect to the pleadings and the proof.

But defendant filed a plea and gave notice of the special defenses that it did not execute any such policy of insurance as alleged in the declaration, and that plaintiff did not make the requisite proof of loss within sixty days. It would thus seem to have supplied the deficiency, if any, of the declaration, and by its own pleading to have set forth the issue referred to the jury, thus curing omission of the specific condition precedent complained of, even if its averment were required. (Wallace v. Curtiss, 36 Ill. 156, 159; 1 Ch. Pl. (10 Am. Ed.) 673.) It is also a familiar principle of practice and pleading that even if the alleged defects in the declaration would have been fatal had they been raised by demurrer, yet if the issue joined be such as necessarily required, on the trial, proof of the facts so defectively stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give, or the jury would have given the verdict, such defect, imperfection or omission is cured by the verdict. (Ch. Pl. 712-713; Gerke v. Panchar, 156 Ill. 375; H. K. Fairbank Co. v. Bahre, 213 id. 636; Miller v. Kresge Co., 306 id. 104; Fargent Co. v. Blaublis, 215 id. 428.) If there was any defect in the declaration in the instant case we have no doubt that under the issues made and proof adduced it was cured by verdict.

... it is not enough to say that the specific conditions
of the injury. The terms and conditions of the contract need not
be specifically set out, if they are set forth in substance. The
very same thing is said upon by plaintiff in error, namely, Hammond v.
Hammond, 23 Ill. App. 2d 112, and Hammond v. Hammond, 23 Ill.
App. 2d 112, 113. These cases, however, are really distinguished
from the case at bar both with respect to the pleadings and the facts.
But defendant filed a plea and gave notice of the special
defenses that it has and cannot now bring in evidence as
alleged in the declaration, and this plaintiff did not make the
necessary proof of facts within their scope. It would seem as
they suggested the deficiency, in fact, of the declaration, and by
the same pleading to have set forth the facts relied on by the jury,
there would be omission of the specific conditions precedent contained
of, even if the averment were repeated. (Hammond v. Hammond, 23 Ill.
App. 2d 112, 113. (2d App. 2d 112, 113.) It is also a familiar
principle of practice and pleading that even if the alleged defense
in the declaration would have been fatal had they been raised by
answer, yet if the issue joined be such as necessarily require
on the trial, proof of the facts so specifically stated or omitted,
and without which it is not to be presumed that either the judge
could advise the jury to give, or the jury would have given the ver-
dict, such defect, imputed to omission is cured by the verdict.
23 Ill. App. 2d 112, 113; Hammond v. Hammond, 23 Ill. App. 2d 112, 113.
* Hammond v. Hammond, 23 Ill. App. 2d 112, 113. It is also a familiar
principle of practice and pleading that even if the alleged defense
in the declaration would have been fatal had they been raised by
answer, yet if the issue joined be such as necessarily require
on the trial, proof of the facts so specifically stated or omitted,
and without which it is not to be presumed that either the judge
could advise the jury to give, or the jury would have given the ver-
dict, such defect, imputed to omission is cured by the verdict.

As to the failure to make proof of loss, it appears that notice thereof was given within a day or two after the theft (which we think was clearly established by the evidence) and that defendant's agent, through whom the policy was issued, visited plaintiff and obtained a written statement from him as to his loss. While plaintiff claims it was sworn to and defendant's agent claimed that it was merely his own report to the company and not a statement by plaintiff and was not sworn to, yet if the jury believed plaintiff's evidence that he was told by said agent, when plaintiff asked if it was necessary for him to inform the insurance company that he, the agent, "would take care of all that," and that said agent later told plaintiff that "everything was turned over and if at the end of sixty days the car had not been found, the claim would be taken care of promptly," it was tantamount to a waiver of the formal proof of loss required, and estops the company from setting up that claim.

As to the value, there was sufficient evidence to sustain the verdict.

We deem it unnecessary to discuss the details as to the theft. If it be a fact that the car disappeared from the control of plaintiff's wife while she was in a state of intoxication, as intimated by the evidence, so that she could not definitely explain the manner of its disappearance, nevertheless, evidence that the car was subsequently found in the hands of other parties under circumstances indicating unlawful possession of the same, made at least a prima facie case of theft.

The judgment is affirmed.

AFFIRMED.

Gridley, F. J., and Scanlan, J., concur.

is to the effect of which I have to report that
 the witness was not able to give any further
 evidence and was discharged by the court and that he
 was not able to give any further evidence.

and obtained a written statement from him as to his loss, this
 statement being in the form of a receipt and was signed by
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It is to be noted that the witness was not able to give any
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The witness is discharged.

Witness: J. B. and Company, etc.

249 I.A. 653

32504

C. H. CLASHAGEL, doing business
as O. K. Grocery & Market,
Appellant,

v.

DR. A. H. WASHINGTON and
MRS. A. H. WASHINGTON,
Appellees.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Plaintiff sued to recover a balance due for groceries sold and delivered to defendants amounting to \$248.84, and also upon an account stated for such an amount.

Defendants claimed over-payment of \$66.26, and the court, before whom the case was tried without a jury, gave judgment in favor of defendants on a set-off for that sum.

Defendants claimed that they were not given credit for a check of \$297.10, dated January 31, 1925, being \$66.26 in excess of the amount claimed as due, nor for \$10 excess interest paid on two notes, thus making the set-off of \$66.20.

There is no question that there was payment of such excess of interest and that defendants were not given credit therefor. Plaintiff claims, however, it was paid voluntarily because of previous large balances remaining unpaid, and for that reason credit was not given therefor. We think the credit should have been allowed.

But the real controversy is over the fact whether defendants received credit for said check of \$297.10.

After the suit was commenced defendants requested a statement of account from plaintiff beginning with January, 1925. As rendered, it purported to show each month's account giving the dates and amounts of credits allowed. It showed a charge of \$286.18 for the month of January and a credit for that amount as of January 2, which, as testified to and as appeared on the books from which the statement was copied should have been February 2. The check for \$297.10, for which defendants claim no credit was given was dated January 31, 1925, and manifestly intended to cover the charge of \$286.18 which was for groceries furnished in the entire month. The explanation of the credit for that charge given by plaintiff and his bookkeeper was to the effect that the check for \$297.10 included said charge and a purchase of groceries amounting to \$10.92 at the time the check was given, and the reason the credit was not given for the exact amount of the check was because no charges were made on plaintiff's books for cash purchases, and hence in giving credit for the check the amount of the cash purchase was deducted therefrom.

The court expressing great doubt whether defendants were entitled to a credit for the amount of the check in addition to the credit they were allowed for such balance of \$286.18, asked if defendants could produce a stub of their check book showing such a check, defendants being unable to produce a paid check therefor. Thereupon at a later hearing defendants produced such a stub purporting to show that a check for said balance was issued December 30, 1924. Such evidence was manifestly a self-serving statement and incompetent, and should not have been received in evidence. The court clearly decided the case on such incompetent evidence. However, as tending to impeach its genuineness, it appeared from the same check

After the said was presented following was the
statement of account from January 1st, 1937, 1938,
is included. It is reported to show each month's account during the

year and amount of credit allowed. It shows a charge of
\$100.00 for the month of January and a credit for that month of
\$100.00, which, as stated, is not in agreement with the
year which the statement was signed, which was January 1,

The check for \$100.00, for which statement claim on credit was
given was dated January 1st, 1938, and actually received in money
the month of 1938.12 which was the respective terminated in the

credit month. The explanation of the \$100.00 is that it was given
by plaintiff and his bookkeeper was to the effect that the check

for \$100.00 included said charge and a purchase of material amounting
to \$100.00 at the time the check was given, and the balance the credit

was not given for the credit amount of the check was because no charges
were made on plaintiff's books for such purchases, and hence in giving
credit for the check the amount of the cash balance was included

therein.

The said statement was signed by plaintiff and the balance was

included as a credit for the amount of the check in addition to the
credit they were allowed for such balance of \$100.00, which is

definitely not correct because a check of \$100.00 does not include such a
credit, otherwise being as this is given a cash credit.

Therefore as a later hearing statement produced from a bank pro-
viding to show that a check for said amount was issued January 30,

1938. Such evidence was actually a well-known statement and
inconclusive, and should not have been received in evidence. The

court clearly stated the law and was completely correct. However,
as finding so important the statement, it appeared from the same check

book that there was a subsequent^{stub} check of a prior date; and it also appeared that on its purported date, December 30, 1924, the balance due from defendants on their account was only \$173.68, which was carried over and included in the \$236.18. It further appears from the testimony of plaintiff and his bookkeeper that monthly statements were sent to defendants showing the balance of their account each month and that no complaint was ever made of their incorrectness. While Mrs. Waddington denied having received them every month her testimony indicates that she did receive some statements and that she never questioned them. She gave little attention to her grocery accounts, leaving the matter almost entirely to her housekeeper who from time to time would hand her the amount of the grocery slips. Even though defendants were unable to produce a paid check for \$236.18 there should have been no difficulty in producing their bank account to show its payment, if made. Without detailing other evidence we are strongly impressed that its preponderance is against the finding and judgment of the court. Hence a judgment will be entered here with a finding of facts in favor of appellant for the amount of his claim, less \$10 over-payment of interest, namely, for \$230.84.

REVERSED AND JUDGMENT HERE FOR \$230.84.

Gridley, S. J., and Scanlan, J., concur.

date

1. The first question is whether the evidence is sufficient to establish that the defendant was present at the scene of the crime. The evidence is that the defendant was seen by the witness at the scene of the crime at the time the crime was committed. The witness also testified that the defendant was the only person seen at the scene of the crime at the time the crime was committed. The evidence is sufficient to establish that the defendant was present at the scene of the crime.

2. The second question is whether the evidence is sufficient to establish that the defendant committed the crime. The evidence is that the defendant was seen by the witness at the scene of the crime at the time the crime was committed. The witness also testified that the defendant was the only person seen at the scene of the crime at the time the crime was committed. The evidence is sufficient to establish that the defendant committed the crime.

3. The third question is whether the evidence is sufficient to establish that the defendant is guilty of the crime. The evidence is that the defendant was seen by the witness at the scene of the crime at the time the crime was committed. The witness also testified that the defendant was the only person seen at the scene of the crime at the time the crime was committed. The evidence is sufficient to establish that the defendant is guilty of the crime.

32504

FINDING OF FACTS.

We find that the check given by appellees to appellant for \$297.10 was given to pay a debit balance against them on appellant's books of \$286.18 for groceries, and to pay for an additional purchase in the amount of \$10.92 made by appellees on the same day; that appellees never gave a check or made a separate payment of \$286.18; that they overpaid interest on their two notes to the amount of \$10, and that there is a balance due from them after giving them credit for said check of \$297.10 and for said \$10, in the sum of \$230.84.

15288

1. The first part of the paper is devoted to the study of the properties of the function $f(x)$ defined by the equation

[illegible]

249 I.A. 653²

32528

STANDARD TRUST & SAVINGS BANK and
CHICAGO TITLE & TRUST COMPANY,
administrators of the estate of
EDWIN B. JENNINGS, deceased,
Appellees,

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

Vs.

F. W. CHERRY and FREDERICK W. HILL,
Appellants.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment in favor of plaintiffs.

The declaration consists of a count in the form usually
employed in suits upon promissory notes, followed by the common
counts consolidated.

The copy of the instrument or note sued upon and filed
reads as follows:

"Chicago, Ill., Feb. 18th, 1921.

\$5,000.00
~~\$10,000.00~~

On or before one year from date we promise to pay to
the order of E. B. Jennings, at Chicago, Ill.,.....
Five Thousand and no/100.....
~~Ten-Thousand-and-no/100~~

Value received with interest at the rate of Seven
per cent per annum, payable semi-annually.

This note is given for the express purpose of
securing funds for the Auto-Sensitive Drilling Machine
Company and it is agreed that it is to be paid off with funds
secured from E. B. Jennings on a loan now being negotiated
by said Company with Jennings, for which loan Hill and
Cherry are to deposit with Jennings certain additional
collateral, including a Trust Deed (approved by Jennings)
to about Four Hundred acres of farm land in Greene County,
Ill.

There is herewith deposited, as collateral, ninety-
seven per cent of the capital stock of the Auto-Sensitive
Drilling Machine Co.

F. W. Cherry
Frederick W. Hill."

Defendants filed the plea of general issue, and a second, third and fourth special pleas, and defendant Cherry filed a plea of non est factum. The second special plea as amended alleges in substance that the instrument sued upon is a memorandum of agreement and receipt for \$5,000 paid by E. B. Jennings to the Auto-Sensitive Drilling Machine Co., for the purpose of securing funds for said corporation, and in said agreement it was understated that said amount should be considered as a part of a loan then being negotiated by said company from said Jennings and to be paid from funds secured from said Jennings on such loan, and that the defendants were to deposit with him collateral, including a trust deed covering about 400 acres of land in Greene County, Illinois, and with such memorandum there should be deposited with Jennings as collateral for such loan seventy-five per cent of the stock of said corporation; that Jennings repudiated the agreement and declined and refused to make any additional loan to said corporation, and to carry out his contract as specified in said instrument, and that no part of said \$5,000 was received by either of the defendants.

The third special plea alleged that on February 13, 1921, an agreement was entered into between said Jennings and said company whereby the former should make a loan of \$25,000 to the latter for a term of years with interest at seven per cent per annum to be secured by ninety-seven per cent of the company's stock and a mortgage upon 400 acres of land in Greene County, and that \$10,000 of said amount was to be paid at once to said corporation; that Jennings breached the agreement and instead of advancing \$10,000 advanced only \$5,000, and that defendants thereupon, at his request, signed the special contract mentioned in the first count of the declaration, a copy of which is attached thereto, as a memorandum to partially evidence the

testimony filed the plan of general issue, and a witness, which
and further special issue, and testimony filed a plan of issue
the issue. The second special issue is a general issue in substance
that the instrument was made in a conversation of witness and
witness for \$2,000 paid by A. E. Lanning to the witness.
Lanning Machine Co., for the purpose of securing funds for said
organization, and in said instrument it was understood that said
funds should be deposited in a bank of a town then being organized
by said witness from said Lanning and to be paid from funds received
from said Lanning on such loan, and that the witnesses were to
deposit with him collected, including a loan that covering about
400 acres of land in Brown County, Wisconsin, and with some money.
There should be deposited with Lanning on February 1st, 1915, ten
thousand-five hundred dollars of the stock of said corporation; that Lanning
represented the agreement and Lanning was ordered to make any additional
loan to said corporation, and to carry out his contract as specified
in said instrument, and that no part of said \$2,000 was received by
either of the defendants.

The third special issue alleged that on February 1st, 1915,
an agreement was entered into between said Lanning and said witness
whereby the former should make a loan of \$10,000 to the latter for a
loan of years with interest at seven per cent per annum to be secured
by ninety-seven per cent of the company's stock and a mortgage upon
400 acres of land in Brown County, and that \$10,000 of said money
was to be paid at once to said corporation; that Lanning promised
the agreement and interest of seven per cent, and witness was to make
and that defendant thereupon, at his request, signed and executed
instruments mentioned in the first part of the bill, and a copy of
which is attached thereto, as a memorandum to produce evidence in

agreement between the said parties; that at that time it was agreed between Jennings and these defendants that the said \$5,000 should apply upon the loan to said company, and be paid by it and not by these defendants, and that said \$5,000 was actually received by said company and not by these defendants; that thereafter Jennings wholly defaulted in the obligations and agreements and refused to make the loan of \$25,000 to said company and to turn over the balance thereof to it; that the company was ready, able and willing to deposit the necessary collateral provided for and the loan was never consummated; that it was further agreed between defendants' said company and said Jennings that the sum of \$5,000 should be paid out of said loan or be considered as a part thereof and be paid by said corporation and not by defendants.

The fourth special plea was one of set-off consisting of the common counts and alleging plaintiffs are indebted to defendants for \$5,000. The notice thereof under the general issue is for \$2500 with interest for cash paid by defendant Hill on behalf of defendants to plaintiffs "under a mutual mistake or misapprehension or misunderstanding of the facts" concerning the special memorandum of agreement sued on.

Appellants contend, first, that there should have been a directed verdict for defendants on the theory that there is a fatal variance between the contract introduced in evidence and the instrument sued on; that plaintiffs could not recover under the common counts without showing full performance on the part of Jennings; that an excuse for non-performance was not pleaded; that Jennings agreed to rely on said Auto Company for payment, and that there was no proof of the performance of the conditions specified in the contract.

These several theories and defenses rest, in our opinion, on defendants' misconstruction of the instrument sued upon. If it is an unconditional negotiable promissory note, as we construe it, none of them is tenable, and none of the evidence offered that tended to vary its meaning was admissible.

The instrument introduced in evidence conforms to the copy of that sued upon, and possesses all the requirements of a negotiable instrument set forth in section 1 of the Negotiable Instruments Act (Cahill's Ill. R. S., par. 21.) One of such requirements is that it must contain an unconditional promise or order to pay a sum certain in money. The contention in the pleadings and argument that the instrument is conditional is based upon the recitals therein following an unqualified promise to pay in usual form. While these recitals indicate a particular fund out of which payment is to be made, they do not contain a promise to pay out of such fund, and hence by the express language of section 3 of said Act (Cahill's Stats. par. 23) the promise is unconditional. The same section also states that an unqualified promise is unconditional though coupled with a statement which gives rise to the instrument.

The recitals, therefore, had no effect to change or qualify the absolute promise of defendants as made in the first paragraph of the instrument.

It appears, too, that the transaction referred to was not consummated when the note was given but was being negotiated. Surely if the negotiations fell through it cannot be reasonably contended that defendants would not be obligated to pay for the money advanced on their promise to pay. It is immaterial whether it was for their personal benefit or was received by the company for which they

were negotiating. It is also immaterial who paid the interest endorsed by Jennings on the note. The principal question, except that raised by the plea of non est factum by defendant Cherry, was whether the instrument sued on was a negotiable promissory note. If so, as we hold, none of the defenses was tenable.

In support of the plea of non est factum defendant Cherry claimed that he signed the note for the sum of \$10,000, and that the change thereof to \$5,000 was without his knowledge or consent. The jury believed the evidence introduced for plaintiff on that subject and we cannot say their verdict was manifestly against the weight of the evidence.

In this view of the case we need not discuss more particularly the points made on this appeal, or the rulings upon the instructions which are in accordance with the views herein expressed.

AFFIRMED.

Gridley, P. J., and Scanlan, J., concur.

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32552

BENJAMIN SCHATZ,
Appellant,

v.

WEST SIDE TRUST &
SAVINGS BANK, a corporation,
Appellee.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Plaintiff's statement of claim is in effect that defendant agreed to transmit to Red Star Line, Warsaw, Poland, \$400 for the transportation of Mojzesz Schatz at a cost of \$29, and thereupon plaintiff paid defendant \$429, that the party mentioned did not receive the money, that it was paid to another party, and that defendant has refused to return the \$429.

Defendant's affidavit of merits denies liability, alleging that it received the money as agent for plaintiff to be remitted to said party at the address "Red Star Line, Warsaw, Poland," that it forwarded the money to the Bank of the United States with instructions to forward \$400 by cable to Mojzesz Schatz, care of Red Star Line, Warsaw, Poland, and did transmit said money to its representative at Warsaw, Poland, with instructions that the same was to be paid to Mojzesz Schatz, care of Red Star Line, and that it used reasonable care and diligence in the transmission of the money.

When the money was paid to Beskin, manager of the foreign exchange department in defendant's bank, he gave a receipt therefor which reads as follows:

"This Order Sent by Cable.

No. 14124

WEST SIDE TRUST & SAVINGS BANK
Cor. Roosevelt Road and Halsted Street
Chicago, Ill.
Phone Canal 1908

Date 2/19/21

Foreign Money Order Receipt

Remittance to - Mojse Szats.
Residence - Red Star Line, Warsaw, Poland
Sent by - E. Schatz
Address - 2167 DeKalb St.

Foreign Remittance Purchased	Amount of Order
U. S. \$400 -	429

Paid seal Feb. 19, 1921. Subject to Conditions
on reverse of this receipt."

Among the conditions on the reverse side thereof are
the following:

"It is expressly agreed that the sender is the
principal and that the bank acts as its agent.

The bank undertakes to instruct its correspondent
to transmit the money through any European post office
to the address designated under insurance for the entire
amount according to the rules prescribed by the Universal
Postal Union; and it is agreed that we are not liable
for any delay caused by the European post offices or any
cause beyond our control.

The bank assumes the same liability towards the
sender, as the European post office does toward the bank,
and in case of loss all proper claims will be adjusted
as and when paid by the European post office * * * .

When money is sent by cable it is fully agreed and
understood that no liability shall attach to this bank
nor to any of our correspondents, for any loss or damage
in consequence of any mistake or delay in the transmission
of a message * * * .

WEST SIDE TRUST & SAVINGS BANK."

It is clear that the written instrument or receipt and
its conditions evidence the real contract between the parties,
and that by its terms and the very nature of the undertaking the
relationship between the parties was that of principal and agent.
(Weiss v. Liberty Trust & Savings Bank, 227 Ill. App. 405, 409;

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ENVIRONMENTAL

Journal of Management Inquiry 22(1)

CONFIDENTIAL - See First Column Below

From the Journal of the American Medical Association, 1974; 230: 1000-1001.

^a Values are means \pm SD.

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

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Fishman v. West Side Natl. Bank, 228 Ill. App. 313, 322; Alamian v. Am. Ex. Co., 237 Mass. 580, 584; Kopets v. Am. Ex. Co., 281 Mass. 136, 140; Nicholetti v. Bank of Los Banos, 214 Pac. Rep. 51, 53.)

It is also held in the several cited cases that where a bank exercises ordinary care in the selection of sub-agents for the transmission of funds, it is not liable even though the funds are not actually delivered.

It appears that most of the conversation with Beekin was had with plaintiff's son, as plaintiff spoke only broken English, and that the son showed defendant a cablegram from his uncle to whom the money was to be transmitted, reading "Pay the Red Star Line \$400, asking cable Warsaw," and asked Beekin what it meant, and he told him they were to send the money to the Red Star line for his uncle, and he accordingly made out the receipt, as aforesaid, and informed plaintiff that the bank would transmit the money to the Bank of the United States in New York which had a representative in Warsaw, who in turn would notify the Red Star Line to send to him for the money. Plaintiff subsequently claimed to have received word from his brother that he had not received the money. It appeared from the testimony of one Mason, the agent of the United States Bank in Warsaw, that when he received the cable message from the United States Bank which read in favor of Mojze Szatz, care of Red Star Line, Warsaw, Poland, for \$400 United States currency, he requested the Red Star Line to advise said Szatz to call with identification documents; that later a person purporting to be Mojze Szatz appeared at his office stating that he was advised by the Red Star Line to call there for the remittance and presented a passport which showed a photograph of said person, and that he thereupon paid him the \$400 and took his receipt therefor.

Plaintiff's two sons testified that they were acquainted with the handwriting of their uncle and that the signature on the

receipt for the money was not in his handwriting. There was, however, no testimony or deposition on the part of the uncle himself as to whether he had received the money. A letter from him to the effect that he had not was not competent proof on the subject. There is no evidence of a want of due care and diligence on the part of defendant, acting as plaintiff's agent, in carrying out the terms of their contract to transmit the money in care of the Red Star Line. If any mistake was made as to the identity of the person to whom the money was paid, which is not altogether clearly established, that mistake would seem to rest upon the Red Star Line in sending the wrong Ssutz or Schatz to said Mason, who paid the money to the person so sent to him with a passport by which he was identified by Mason. Upon this state of facts we think plaintiff failed to show liability on the part of defendant.

AFFIRMED.

Gridley, P. J., and Scanlan, J., concur.

32567

DEREE & COMPANY,
a corporation.
Appellee.

v.
CENTRAL
ILLINOIS RAILROAD COMPANY,
a corporation.
Appellant.

249 I.A. 653⁴

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is a suit to recover an alleged loss of \$781.80 resulting, as claimed, from defendant's mishandling a carload of sugar billed from New Orleans to Chicago, and consigned by an "order notify bill of lading" to plaintiff. From a verdict and judgment against plaintiff for that sum this appeal was taken.

The shipment arrived at Chicago, April 3, 1924. Notice thereof was given to and received by plaintiff the same day. The car remained on a track in defendant's yard until as late as April 11, 1924, available for delivery on proper demand, when it was diverted to Joliet by mistake, under another bill of lading erroneously designating the same car. No order was given by plaintiff, or received by defendant, as to the disposition of the shipment until April 15 when plaintiff requested that the car be switched to the Bibley warehouse. Delivery to the warehouse not being made forthwith, conversations ensued, the car was traced, and plaintiff was informed of the diversion on May 6. Having made a sale of the shipment plaintiff made an arrangement with defendant's agent, Hart, for the delivery of a warehouse receipt for a like kind, quality and quantity of sugar in the Inland warehouse, and plaintiff wrote to Hart, referring to such agreement and enclosing

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THE UNIVERSITY OF CHICAGO
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a claim for damages. Defendant claimed there was an understanding when the substitution was made that no claim would be filed.

Whether or not there was such an understanding or an accord and satisfaction, as claimed by appellant, was a question of fact for the jury. But if, as also contended by appellant, incompetent proof of damages was received and the jury was not properly instructed, the judgment must be reversed.

From April 3 to April 11, when the diversion was made, the shipment was in defendant's yards available for delivery upon a proper demand therefor. Such a demand required surrender of the order bill of lading. (Babbitt v. Grand Trunk Ry. Co., 285 Ill. 267.) No surrender or even a tender thereof was made until May 6, when on its surrender plaintiff, pursuant to such arrangement, received said Inland Warehouse receipt. In the meantime the order bill of lading was in the possession of a bank with which it had been discounted.

From this state of facts it is clear that prior to May 6, defendant was under no obligation to make a delivery without the surrender of the bill of lading, which plaintiff was in no position to make; and had defendant made a delivery without the surrender of the bill of lading it would have done so at its peril. (Babbitt case, supra.)

But proof of damages was made and received on a different theory. Plaintiff was permitted to introduce evidence of the market value in Chicago of the sugar in question on the date of its arrival, April 3, and also on the dates of April 15 and May 6. Such proof showed a declining market after the arrival, and the verdict and judgment were manifestly based upon the difference between the value at

a claim for damages. Defendant claimed there was an understanding when the defendant was made that he would be paid.

Whether or not there was such an understanding or an accord and satisfaction, as claimed by defendant, was a question of fact for the jury. But if, as also contended by defendant, independent proof of damages was received and the jury was not properly instructed, the judgment must be reversed.

From April 8 to April 11, when the division was made, the claimant was in defendant's hands available for delivery upon a proper demand therefor. With a proper demand payment of the value of the bill of lading. (Exhibit A. v. Exhibit B. 100. 111. 112.) The surrender or even a tender thereof was made until May 6, when on the surrender plaintiff's demand for such surrender, he received said bill of lading for value. In the meantime the bill of lading was in the possession of a bank with which it had been deposited.

From this state of facts it is clear that prior to May 6, defendant was under no obligation to make a delivery against the surrender of the bill of lading, which plaintiff was in no position to make; and had defendant made a delivery against the surrender of the bill of lading it would have been at its peril. (Exhibit C.)

CONCLUSION.

But proof of damages was made and received on a bill of lading. Plaintiff was permitted to introduce evidence of the value of the bill of lading at the time in question as the date of the delivery. April 8, and also on the dates of April 11 and May 6. And hence a decision was made after the arrival, and the verdict was accordingly entered based upon the difference between the value of

the time of arrival and the time of substituted delivery, plus a brokerage commission on sugar sales.

Whatever liability defendant would have incurred had plaintiff made a demand with the statutory accompaniments required by section 9 of the Federal Bills of Lading Act, including "possession of the bill of lading and an offer in good faith to surrender, properly endorsed, the bill which was issued for the goods, if the bill is an order bill," yet there being no proof of a demand made in compliance with such statute, or in fact as provided for in the order bill of lading itself, we fail to see that plaintiff was in any position to claim damages for any detention of the shipment prior to the time plaintiff actually surrendered the bill of lading, namely, on May 6. So far as the evidence discloses, plaintiff was in no position to accept delivery prior to that date, it not having possession of or having made tender of the order bill of lading. In the absence of a tender, not until such surrender was there a proper demand, and not until then was defendant obligated to make delivery. It would seem, therefore, that demand and delivery were coincident and that plaintiff on surrender of the bill received in return therefor a negotiable warehouse receipt for the same kind, quality and quantity of sugar consigned to it. Hence it is difficult to see wherein the evidence tended to establish any loss for which defendant would be legally liable. The evidence received as to damages was, therefore, incompetent, and it was error to give instructions on the basis thereof. Accordingly the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

Gridley, P. J., and Scanlan, J., concur.

421 - 32362

THE HARMONY CAFETERIA COMPANY,
a corporation, A. J. COOPER and
S. COOPER,

Appellees.

v.

INTERNATIONAL SUPPLY COMPANY,
a corporation,

Appellant.

249 A. 654

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

In the Municipal Court of Chicago, in an action in contract, the plaintiffs, The Harmony Cafeteria Company, a corporation, A. J. Cooper and S. Cooper, obtained a judgment by confession against the defendant, International Supply Company, a corporation, in the sum of \$820. The plaintiff's claim was for rent due upon the same written lease that formed the basis of the claim in case No. 32361, The Harmony Cafeteria Company, a corporation, A. J. Cooper and S. Cooper v. International Supply Company, a corporation. See opinion this day filed in that case. The lease is sufficiently described in that opinion. In the instant case the defendant filed a motion to vacate the judgment and in support thereof filed an affidavit of the president of the defendant corporation. The material facts alleged in the affidavit in the instant case are the same as in the affidavit filed in case No. 32361. The trial court entered an order overruling the defendant's motion and this appeal followed. The briefs, contentions and arguments in the instant case are the same as those in that case.

For the reasons stated in the opinion filed in that case, the judgment of the Municipal Court in the instant case is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

EXHIBIT A. 624

ALL - 10000

THE HANCOCK LUMBER COMPANY,
INCORPORATED IN THE STATE OF
MAINE, U.S.A.

ALSO THE HANCOCK LUMBER COMPANY

INCORPORATED IN THE STATE OF
MAINE, U.S.A.

IN WITNESS WHEREOF, I have hereunto set my hand and the seal of the Court at Portland, Maine, this 10th day of June, 1910.

In the Municipal Court of Portland, Maine, in an action in law
brought by the plaintiff, The Hancock Lumber Company, a corporation,
against the defendant, J. J. Bennett, a person, a judgment of damages against
the defendant, J. J. Bennett, in the sum of \$100.00, was rendered in the
year 1908. The plaintiff's claim was for loss of value of the same
timber lands that formed the basis of the claim in case No. 12553.
The Hancock Lumber Company, a corporation, and J. J. Bennett and

Robert V. International Lumber Company, a corporation, was a claimant
in this case. The issue in this case was the defendant's claim to
that timber. In the instant case the defendant filed a motion to
vacate his judgment and in support thereof filed an affidavit of the
president of the defendant corporation. The affidavit stated
that in the year 1908 the defendant was the owner of the timber
lands in case No. 12553. The said lands were in the year 1908
the defendant's property and this property belonged to the
defendant and was in the hands of the defendant in the year 1908.

The reasons stated in the opinion filed in this case.
The judgment of the Municipal Court in the instant case is affirmed.

GRANTED, J. J. and Bennett, J. J. Bennett.

483 - 32364

THE HARMONY CAFETERIA COMPANY,
a corporation, A. J. COOPER
and S. COOPER,

Appellees,

v.

INTERNATIONAL SUPPLY COMPANY,
a corporation,

Appellant.

249 I.A. 654²

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

In the Municipal Court of Chicago, in an action in contract, the plaintiffs, The Harmony Cafeteria Company, a corporation, A. J. Cooper and S. Cooper, obtained a judgment by confession against the defendant, International Supply Company, a corporation in the sum of \$110. The plaintiffs' claim was for rent due upon the same written lease that formed the basis of the claim in case No. 32361, The Harmony Cafeteria Company, a corporation, A. J. Cooper and S. Cooper v. International Supply Company, a corporation. See opinion this day filed in that case. The lease is sufficiently described in that opinion. In the instant case the defendant filed a motion to vacate the judgment and in support thereof filed an affidavit of the president of the defendant corporation. The material parts of the affidavit, so far as this appeal is concerned, are as follows:

"That at the time of entering into the lease between the plaintiff and the defendant, the plaintiff promised the defendant, that he would give unto the defendant the use of, during the term of said lease, a certain storage place in the basement of the building of which the defendant's premises are a part, and that said storage place or space would be part of the premises demised, which said space and place was at the time designated and set apart and partitioned off by the defendant, and subsequently occupied by the defendant for about three (3) months after January 1st, 1926,

during which time it was used by the defendant to store merchandise, stock and fixtures and boxes used in the defendant's business; which said space and premises are appurtenant to the premises in the written lease, and are material and essential to the conduct of defendant's business; that on or about April 19th, 1926, the plaintiff moved into and occupied the second floor of the building at 81 West Van Buren Street, said building being the one in which the premises occupied by the defendant are located, and in addition to occupying said second floor the said plaintiff took possession and made use of a greater portion of the basement, and also that portion of the basement, which had been set aside for storage purposes for the use of the defendant; that as a consideration for the entering into of the lease upon which judgment was taken in this case the plaintiff promised unto the defendant that it would be allowed to place a sign on the front of said building; that he (defendant) has repeatedly notified the plaintiff, and has oft requested that the defendant be allowed to use the aforesaid designated space, and to remove the rubbish and belongings of the plaintiff from the aforesaid space so that the defendant may occupy the same, but the plaintiff has wholly refused so to do, and still refuses so to do."

The trial court entered an order overruling the defendant's motion and this appeal followed. The briefs, contentions and arguments in the instant case are the same as those in case No. 32361.

For the reasons stated in the opinion filed in that case, the judgment of the Municipal Court in the instant case is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

32463

REX RAYON THREAD COMPANY,
a corporation,

Appellee.

v.

BOOSTER GLOVE COMPANY,
a corporation,

Appellant.

2491A. 654

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

In the Municipal Court of Chicago, the Rex Rayon Thread Company, a corporation, plaintiff, sued the Booster Glove Company, a corporation, defendant, in an action of the first class. Plaintiff's claim was for goods, wares and merchandise, consisting of yarns and threads, sold and delivered to the defendant, at its special instance and request, amounting to \$1624.10. An affidavit of plaintiff's claim was filed with the statement. The original and the amended affidavits of merits were, upon motion of the plaintiff, stricken from the files. The defendant then filed a second amended affidavit of merits as follows:

"EDWARD E. STEINBERG makes oath and says that he is the duly authorized agent of the defendant and has knowledge of the facts in the above entitled cause, and that he verily believes that said defendant has a good defense to this suit, upon the merits, to the whole of the plaintiff's demand.

Affiant further states that the defense of the defendant to said suit is as follows:

Defendant states that during the period mentioned in the plaintiff's Statement of Claim and for a long time prior thereto, it was at all times dealing with a certain SAMUEL BAYER who represented to this defendant that he is the largest stock-holder in a certain City Thread Manufacturing Company, a New York Corporation; that this defendant repeatedly ordered goods from said SAMUEL BAYER, which ordered goods were delivered by the said City Thread Manufacturing Company; that on or about

24914.024

10123

THE HAYES TRUST COMPANY
A CORPORATION

TRUSTEES TRUST COMPANY
A CORPORATION

IN SENATE
JANUARY 10, 1906

REPORT OF THE COMMISSIONER OF THE LAND OFFICE
IN RESPONSE TO A RESOLUTION PASSED BY THE SENATE
JANUARY 10, 1906
ALBANY: J.B. KNEELAND, STATE PRINTER
1906

"HONORABLE SENATOR JAMES C. HARRIS
IN THE SENATE OF THE STATE OF NEW YORK
JANUARY 10, 1906
REPORT OF THE COMMISSIONER OF THE LAND OFFICE
IN RESPONSE TO A RESOLUTION PASSED BY THE SENATE
JANUARY 10, 1906
ALBANY: J.B. KNEELAND, STATE PRINTER
1906

October 21, 1926, said Samuel Bayer, intending to deceive and defraud this defendant, induces said defendant to discount the following two instruments:

\$1598.95 West Point, Miss. October 21, 1926.

On February 21st, 1927 ----- Pay to the Order of
City Thread Manufacturing Co., Inc.

Fifteen hundred ninety eight ----- 95/100 Dollars

VALUE RECEIVED AND CHARGE THE

SAME TO ACCOUNT OF

To Wayne Cotton Mills, Inc. City Thread Mfg. Co.

No. West Point, Miss.

Julius Bayer, Pres.

\$1625.15

West Point, Miss. October 21, 1926.

Fee 2.64

\$1627.79 On February 10th, 1927 ----- Pay to
The Order of City Thread Mfg. Co., Inc.

Sixteen hundred twenty five ----- 15/100 Dollars

VALUE RECEIVED AND CHARGE SAME

TO ACCOUNT OF

To Wayne Cotton Mills, Inc. City Thread Mfg. Co.

No. West Point, Miss.

Julius Bayer, Pres.;

that on the due dates of said two promissory notes, said SAMUEL BAYER and CITY THREAD MFG. COMPANY advised this defendant that they desire to obtain an extension of time in the payment of said notes, also reduce same to \$3,000.00, and that in consideration therefore, they would pay the interest up to date and execute a new note for said sum of \$3,000.00; that they executed a promissory note in the sum of \$3,000.00 payable to the order of this defendant and was then and there delivered to this defendant in lieu of the aforesaid two promissory notes; that said note heretofore became due and payable and that said City Thread Manufacturing Company failed to pay same, nor any part thereof, nor was any part of said note paid on behalf of the parties to said note, to this date; that prior to the due dates of said notes, said SAMUEL BAYER, repeatedly advised this defendant that said City Thread Manufacturing Company is organizing a subsidiary which will be owned and operated by said SAMUEL BAYER and said City Thread Manufacturing Company; that all orders for goods given by this defendant to the said SAMUEL BAYER, will be filled by either the City Thread Manufacturing Company or by this new subsidiary thereof; that the name of said subsidiary will be Rex-Rayon Thread Company; that the prices for merchandise and conditions for sales of merchandise will be the same besides that the stationery will be different, in that it will show that the name is Rex-Rayon Thread Company, which is the name of the plaintiff herein; that said SAMUEL BAYER further represented to this defendant that he will appreciate larger orders for goods, so that the money due this defendant on said notes, will pay for such goods; that in pursuance thereto, this defendant did give larger orders to the City Thread Manufacturing Company or said Rex-Rayon Thread Company, its subsidiary; that prior to the transaction relating to said notes, this defendant did not at any time purchase such large volumes of goods as subsequent to the request of said SAMUEL BAYER, as aforesaid; that said Rex-Rayon Thread Company demanded payment from this defendant of the goods described in the plaintiff's

REPORT OF THE COMMISSIONER OF THE GENERAL LAND OFFICE
IN RESPONSE TO A RESOLUTION OF THE HOUSE OF REPRESENTATIVES
PASSED MAY 1, 1894, RELATIVE TO THE LANDS BELONGING TO THE
UNITED STATES IN THE TERRITORY OF ARIZONA

[illegible][illegible][illegible]

Statement of Claim, notwithstanding the representations of said SAMUEL BAYER to purchase merchandise and have same off-set by said \$3000.00 cash advanced; that this defendant declared its willingness to adjust said bills providing however, said \$3000.00 in cash advanced by this defendant to said Company will first be paid to this defendant. This defendant states that it has no knowledge of said plaintiff being a corporation; that it has no knowledge whether it is a New York corporation; or a corporation organized under the laws of any other state, or whether it was ever organized as a corporation, and further denies that it unreasonably and vexatiously delayed the payment of the amount set forth in the plaintiff's Statement of Claim, and further denies that the amount of \$1624.10 is due this plaintiff nor any amount whatsoever and states that there is due this defendant from this plaintiff a large sum of money, as aforesaid."

On motion of the plaintiff, the second amended affidavit of merits was stricken from the files, a default was entered against the defendant for want of an affidavit of merits, and there was a finding that there was due the plaintiff the sum of \$1624.10. Judgment was entered on the finding and this appeal followed. The plaintiff has failed to file an appearance or a brief in this court.

The defendant contends that the court erred in striking the defendant's second amended affidavit of merits from the files. No rule of the Municipal Court is incorporated in the transcript of the record, and as we cannot take judicial notice of the rules of that court (Gibby v. Chicago City Ry. Co., 260 Ill. 478) section 55 of the Practice Act controls. That section permits a judgment by default for want of a sufficient affidavit of merits and it requires that the defendant's affidavit of merits shall specify "the nature of such defense." Of course, the facts stated in the affidavit of merits in reference to the alleged dealings of the defendant with the City Thread Manufacturing Company and Samuel Bayer do not constitute a legal defense to the claim of the plaintiff but the defendant contends, that if these facts are disregarded, the allegation in its affidavit that defendant "further denies that the amount of \$1624.10 is due this plaintiff nor any amount whatsoever," alone, makes out a complete defense to the plaintiff's

statement of claim. But one defense is attempted to be made out by the affidavit of merits and the present contention of the defendant is plainly an afterthought and without merit. The defendant, in its affidavit, does not deny receiving from the plaintiff the goods in question, and it practically admits that it did not pay for the same, and it states that it was willing to adjust the bill of the plaintiff provided the latter paid the defendant the \$3000 advanced by the latter to the City Thread Manufacturing Company. It is clear that the statement that the "defendant * * * denies that the amount of \$1624.10 is due this plaintiff nor any amount whatsoever and states that there is due this defendant from this plaintiff a large sum of money, as aforesaid," is based solely on the claim of the defendant that it had a right to purchase merchandise of the plaintiff and to apply the \$3000 advanced by it to the City Thread Manufacturing Company in payment of the same. The defendant, in the trial court, had three opportunities to file a sufficient affidavit of merits, and it is obvious that it has no legal defense to plaintiff's claim.

The judgment of the municipal Court of Chicago is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

32485

JOSEPH V. STERBA et al.,
Appellants,

v.

GEORGE O. SCHOOLCRAFT,
Appellee.

249 I.A. 654⁴

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

In the Circuit Court of Cook County, Joseph V. Sterba and Adolph Bondy, complainants, filed their bill against George O. Schoolcraft and Continental and Commercial Trust and Savings Bank, defendants, praying for a cancellation and rescission of a certain agreement, made between the defendant Schoolcraft and the complainants, whereby the complainants agreed to purchase from the defendant Schoolcraft 112½ shares of the capital stock of H. S. Peterson & Company for \$90,000, of which amount \$15,000 was paid in cash at the time of the making of the agreement, and the balance paid by ten collateral notes, signed by the complainants, payable at various intervals and totaling \$75,000. The bill alleges that the shares of stock were deposited with the defendant Schoolcraft as collateral security for the payment of the notes and that the notes were deposited by the said defendant with the Continental and Commercial Trust and Savings Bank, defendant, for collection. The bill further alleges that prior to, and at the time of, the execution of the agreement, the defendant Schoolcraft made certain false and fraudulent misrepresentations to the complainants and that if it had not been for said misrepresentations the complainants would not have made the agreement. The defendant Schoolcraft, in his answer,

100-100000

JOHN V. HENRY & CO.
ATTORNEYS

CHARGE OF PROSECUTION
BY THE ATTORNEY GENERAL

MR. JUSTICE HENRY DELIVERED THE VERDICT ON THE CASE.

In the Circuit Court of Cook County, George V. Henry
and John Henry, complainants, filed their bill against George
V. Henry and his associates and associates of the same name
and name, praying for a declaration of nullity of the
certain agreement, made between the defendant and the
complainants, whereby the complainants agreed to purchase from
the defendant a certain stock of the capital stock of
the defendant company for \$50,000, of which amount \$10,000 was
paid in cash at the time of the making of the agreement, and the
balance paid by the defendant company, which was the
subject of various interviews and dealings between the complainants
and the stock of stock as deposited with the defendant company
as evidenced thereby for the payment of the notes and that the notes
were deposited by the said defendant with the complainants and
Commutual Trust and Savings Bank, defendant, for collection. The
bill further alleged that the said bill was not a true and correct
of the agreement, the defendant company with the complainants and
that the defendant company was not a corporation and that it is
not a corporation and that the defendant company was not a corporation
and that the defendant company was not a corporation and that the
defendant company was not a corporation and that the defendant company
was not a corporation and that the defendant company was not a corporation.

denied that any of the representations made by him to the complainants were false. The bank filed a formal answer to the bill. On complainants' motion, the cause was referred to a master in chancery, who heard evidence and prepared a report recommending that the bill of complaint be dismissed for want of equity, for the reason that the material allegations of the bill were not sustained by the proof. Objections were filed to the report, and before the master had passed upon the same, the complainants, by leave of court, filed a sworn amendment to their bill, alleging that the defendant Schoolcraft fraudulently represented to the complainants that the accounts receivable and accounts payable of H. S. Peterson & Company were equal and would balance. The defendant Schoolcraft filed a sworn answer to the amended bill, in which he denied making the alleged fraudulent representations and interposed laches as a defense. No further proof was presented. The master then made a report, in which he found that certain of the alleged false representations were not sustained by the proof, but that the allegation that the defendant Schoolcraft falsely and fraudulently represented to the complainants that the accounts receivable and the accounts payable of said H. S. Peterson & Company were equal and would balance was sustained by the evidence; that as a matter of fact they were not equal and would not balance. The master further found that "the complainants, after obtaining full knowledge of the financial condition of the company and of the Critchfield account in March, or at the latest in April, 1926, kept on with the business without any protest or objection to Schoolcraft (except the protest as to the income tax, which is immaterial); and because they made no objection and demanded no restitution from Schoolcraft as to the Critchfield account, and because, with full knowledge of the facts,

...that any of the representations made by him to the Commission
were false. The bank filed a formal answer to the bill. On the
plaintiff's motion, the case was referred to a master in chancery, who
heard evidence and prepared a report recommending that the bill be
dismissed for want of equity, for the reason that the
material allegations of the bill were not sustained by the proof.
Objections were filed to the report, and before the master had passed
upon the same, the complainant, by leave of court, filed a motion
to sustain his bill, alleging that the defendant's conduct
fraudulently represented to the complainant that the account was
settled and amounts payable of \$100,000. The defendant's answer was
that the account was not settled. The defendant's bill was a motion
to dismiss the bill, in which he stated that the alleged transaction
represented and intended to be a defraud. He further stated
that the master had passed upon the report, in which he found that
evidence of the alleged transaction was not sustained by the
proof, but that the defendant's bill was a motion to dismiss the bill
and fraudulently represented to the complainant that the account
was settled and amounts payable of \$100,000. The defendant's answer
was that the account was not settled and was sustained by the proof. The master
found that they were not equal and could not be sustained. The master
further found that the complainant, after obtaining full knowledge
of the fraudulent condition of the company and of the defendant's account
in 1911, or at the latest in 1912, kept on with the business
without any protest or objection to the defendant's (company's) account
as to the income tax, which is immaterial, and because there was no
objection and demanded no restitution from the defendant as to the
defendant's account, and because, with full knowledge of the facts,

they paid the note due July 1, 1926, on July 6, 1926, they are guilty of laches and should not now be granted a rescission of the contract. The Court cannot now unscramble the affairs of H. H. Peterson & Company and restore the parties to their original position; to attempt to do so now, in the opinion of the Master, in view of the acquiescence of the complainants, their continuing in the conduct of the business without protest for several months, and their payment of the first note, would be inequitable and unjust. The complainants, the Master believes, must be held to have ratified the contract with Schoolcraft." The master recommended that the bill, as amended, should be dismissed for want of equity. Upon the hearing, on the objections to the master's report, the chancellor held that "the Master erred in finding that the defendant, Schoolcraft, falsely and fraudulently represented to the complainants on March 20, 1926, and on March 19, 1926, or at any time, that the accounts receivable and the accounts payable of said H. H. Peterson & Company were equal and would balance." The chancellor sustained all the other findings of the master and ordered the bill dismissed for want of equity. The complainants have appealed.

The complainants contend, first, that "laches does not constitute a defense under the state of facts disclosed by this record, and there was no ratification of the contract" by the complainants, and, second, that the chancellor erred in finding that "the Master erred in finding that the defendant, Schoolcraft, falsely and fraudulently represented to the complainants on March 20, 1926, and on March 19, 1926, or at any time, that the accounts receivable and the accounts payable of said H. H. Peterson & Company were equal and would balance." The defendant strenuously and with considerable force argues that the finding of the chancellor in reference to the alleged false representations

They paid the note and half a year, on May 1, 1903, they are
policy of factors and should not now be treated a revelation of the

expressed. The Court cannot now unambiguously the words of N. 1.

Testimony of Company and restore the parties to their original position
is attempt to do so now, in the opinion of the Court, in view of the
requirements of the complaint, their continuing in the conduct of
the business without paying the interest on the note, and their payment of
the first note, would be inadvisable and unjust. The complaint, the

Master believes, must be held to have satisfied the contract with

Chancellor. The master recommended that the bill be amended, should
be dismissed for want of equity. Upon one hearing, on the objection
to the master's report, the Chancellor held that the bill as amended is

finding that the defendant, defendant, defendant, defendant, defendant

represented to the complainant on March 20, 1903, and on March 22,

1903, or at any time, that the accounts receivable and the accounts

payable of said N. 1. Peterson & Company were equal and would balance.

The Chancellor sustained all the other findings of the master and entered
the bill dismissed for want of equity. The complainant has appealed.

The complainant contends, first, that "Peterson & Co. was not con-

stitute a balance sheet for the year 1903 as shown by the master's

and there was no reflection of the contract" by the complainant, and

second, that the Chancellor erred in finding that the bill as amended is

finding that the defendant, defendant, defendant, defendant, defendant

represented to the complainant on March 20, 1903, and on March 22,

1903, or at any time, that the accounts receivable and the accounts

payable of said N. 1. Peterson & Company were equal and would balance.

The defendant strenuously and with considerable force argues that the

finding of the Chancellor in reference to the alleged false representation

was fully justified by the proof, but in the view that we have taken as to the question of laches, we do not deem it necessary to pass upon the question of false and fraudulent representations.

The deal between the parties was closed about March 20, 1926, and the physical assets of H. S. Peterson & Company were moved by the complainants to their place of business in Chicago, where they operated by the name of the Savoy Drug & Chemical Company, and the complainants, as was conceded on the oral argument, have ever since continued to conduct the business of H. S. Peterson & Company. The master found that "after Sterba and Bondy took control of the business on March 22, 1926, they found out about its true financial condition. There was not enough money to pay the bills. Bondy testified that they knew the financial condition of the business without any examination of the books a few days after they took possession, because statements came in from Critchfield. Sterba testified that he ascertained on Monday, March 22, 1926, that there was an indebtedness to Critchfield; that he talked to a representative of Critchfield & Co. the same week; that he first saw Complainants' Exhibit 1 of Jan. 14, 1927 (the Schedule of advertising ordered, dated Feb. 11, 1926, showing a total of \$8415.00), about the following week after March 20, 1926; that a representative of Critchfield & Company informed him a week after they took the business over that the advertising was already set up and payable; that nothing could be done with it. Westling made up a trial balance for Sterba and Bondy every month. Sterba, and probably Bondy as well, examined this trial balance every month, beginning - at least - with the trial balance for April, if not that for March. In the first week of July, 1926, Sterba and Bondy had an audit made of the business. They gave their personal notes for the advertising bills. They paid in April one of the unpaid

was fully justified by the facts, but in the case of the latter
as to the question of justice, we are not sure it is necessary to show that
the question of time and financial representation.
The fact between the parties was clear about March 11, 1932,
and the physical assets of N. C. Johnson & Company were taken by the
commissioners to their place of business in Chicago, where they operated
by the name of the New York & Chemical Company, and the commission
as was concluded on the oral agreement, have ever since continued to man-
age the business of N. C. Johnson & Company. The matter of the
fact that the New York & Chemical Company was in business in March 11, 1932,
after that time and they were in control of the business in March 11, 1932,
they found out about the time financial condition. There was not
enough money to pay the bills. They concluded that they had the
financial condition of the business without any consultation of the bank
a few days after they took possession. Several statements were in form
of affidavits. It was concluded that an investigation on March 11, 1932,
1932, that there was an understanding to Chicago; that the fact
as a representative of Chicago & Co. the same was that the fact
was confidentially, Exhibit I of Jan. 22, 1932, (the statement of advertising
placed, dated Feb. 11, 1932, showing a total of \$111,000, about the
following were after March 11, 1932, that a representative of Chicago
a company informed him a week after they took the business over that
the advertising was already set up and reported that business would be
done with it. Nothing was set up a trial balance for Chicago and New York
every month. There, and probably about an equal amount, this trial
balance every month, beginning - at least - with the trial balance for
April, it was that for March. In the first week of July, 1932, Chicago
and New York had no credit made of the business. They gave their personal
notes for the advertising bills. They paid in full one of the capital

instalments on the income tax, and took the matter up with Schoolcraft and protested to him; they paid another (apparently in July), and protested to Schoolcraft, by letter, with the request that he come in to see whether they could adjust it, and they asked him to hold off the notes and the payment until he would come in. Schoolcraft never replied to their letter. On July 6, 1926, the complainants paid their first note given pursuant to said contract, being the note for \$5000.00 due July 1, 1926, with \$85.83 interest. The notes that fell due subsequent to July 1, 1926, are now being held by the Continental and Commercial Trust and Savings Bank for collection on behalf of Schoolcraft. Schoolcraft now resides in Los Angeles, California. On September 14, 1926, Sterba and Bondy wrote the following letter to Schoolcraft, which was received by him that same month, to-wit:

' * * * You are hereby notified that by reason of the misrepresentations made by you to us at the time and immediately prior to the signing of the agreement dated March 19, 1926, whereby we agreed to pay you the sum of \$90,000.00 for 112 1/2 shares of the capital stock of H. B. Peterson & Company, we have decided to rescind said agreement and hereby request you to return to us the money heretofore paid you under said agreement and cancel all the remaining unpaid notes which were turned over to you under the terms of said agreement and we hereby tender and offer to assign or reassign and turn over to you all of the capital stock of said H. B. Peterson & Company received by us under said agreement.'

It should be noted that in this letter they fail to state what the 'misrepresentations' they refer to were. The complainants have continued in the operation and management of the business from March 22, 1926, to the present time. The record does not disclose any protest or objection made by them to Schoolcraft as to his fraudulent representation that the accounts receivable equaled the accounts payable, other than said letter of September 14, 1926, nor does the record disclose any claim by Sterba and Bondy that Schoolcraft made

...on the 1st of July, 1936, and took the matter up with ...
...and proposed to ... they said ... in July,
...and proposed to ... by letter, with the ...
...in the ... they said ... and they asked him to
...with the ... and the ... will be ...
...to their letter. On July 1, 1936, the ...
...their first note given ... to ...
...July 1, 1936, with ...
...to July 1, 1936, and now being held by the ...
...and ... Bank for collection on behalf of
... Charles's new residence in ...
... On September 14, 1936, ... and ...
... which was received by him ...

... You are hereby notified that by reason of
... by you to me on the ...
... of the ...
... we agreed to pay you the sum of
... of the ...
... we have decided to ...
... to ...
... and ...
... and ...
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any representation as to the accounts receivable equalling the accounts payable, other than said letter of September 14, 1926, until the complainants testified before the Master at the trial. There is no evidence that the business was ever carried on at a loss." After a careful consideration of the record, we are satisfied that the master was justified in making these findings and that the chancellor did not err in overruling the objections of the complainants to the same.

A party who desires to rescind a transaction for fraud must, upon discovery of the facts, announce his purpose and adhere to it, and cannot be permitted to stand passive and speculate as to whether he will rescind the transaction or waive the fraud, as the events of the future may determine it to be most profitable for him. (Follett v. Brown, 133 Ill. 244.) "The rule is well settled that when a party desires to rescind a contract upon the ground of fraud, it is his duty to act promptly and at once tender back what he has received under the contract. If he remain silent and proceed to complete the contract or in any way recognize the validity thereof after he has notice of the fraud, he will be held to have waived the objection and be conclusively bound by the contract." (Haugle v. Yerkes, 137 Ill. 353, 364, and cases cited.) Delay and vacillation are fatal to the right to rescind. (Greenwood v. Fenn, 136 Ill. 146.) Many other Illinois cases to the same effect might be cited.

The evidence shows that the complainants, after they obtained full information as to the condition of the accounts of H. M. Peterson & Company, not only failed to promptly rescind the contract, but, as a matter of fact, they ratified it by their acts when at the time they did so all the alleged false and fraudulent misrepresentations, of which they now complain, were fully known to

and representation as to the accounts receivable according to
accounts payable, about their status at December 31, 1934.
until the complaint was filed before the Master of the Court.
There is no evidence that the complaint was ever admitted as to a
fact. That a certain consideration of the account, we are not
that the master was justified in making these findings and
that the complaint did not set in overturning the findings of the
complaint as to the same.

First the master is justified in finding that the
master, upon discovery of the facts, announced his purpose and intent
to do so, and cannot be permitted to stand passive and inactive as to
whether he will rescind the transaction or waive the fraud, as the
effect of the master's decision is to be most beneficial for him.
(Wright v. Smith, 188 Ill. 344.) "The rule is well settled that
when a party desires to rescind a contract upon the ground of fraud,
it is his duty to act promptly and to give notice thereof to the
party under the contract. If he delays and proceeds to
complete the contract or in any way recognizes the validity thereof
after he has notice of the fraud, he will be held to have waived the
fraud and he cannot rescind by the contract." (Wright v.
Smith, 188 Ill. 344, and cases cited.) Delay and recognition
are fatal to the right to rescind. (Wright v. Smith, 188 Ill.
344.) Many other Illinois cases to the same effect might be cited.
The evidence shows that the complaint, after they
obtained this information as to the condition of the accounts of
W. C. Peterson & Company, was not filed in prompt and proper
manner, but, as a matter of fact, they waited 11 days before
even filing as the time they did as all the alleged facts and circumstances
misrepresentations, of which they now complain, were fully known to

them. We cannot escape the conclusion that the complainants, after they learned of the alleged false and fraudulent representations, nevertheless, determined to try out the business, and if it proved to be a money-maker they would keep it, otherwise turn it back to the defendant. At the time they paid the July note they were apparently satisfied to continue the business. What caused them to change their minds at the time they wrote the letter of September 14, 1926, the record does not disclose. Under the facts and the law, the chancellor was justified in finding the complainants guilty of laches and in dismissing the bill for want of equity.

The decree of the Circuit Court of Cook County is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

32501

EVELYN SILVERBERG,
Appellee,

v.

BERNARD W. SNOW, Bailiff
of the Municipal Court of
Chicago, and CHAS. A. STEVENS
AND BROS., a corporation,
Appellants.

2497 A. 654
APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

In an action of the first class, in the Municipal Court of Chicago, Evelyn Silverberg, plaintiff, sued Bernard W. Snow, Bailiff of the Municipal Court of Chicago, and Chas. A. Stevens and Bros., a corporation, defendants, to recover possession of certain personal property that she claimed belonged to her and which had been levied upon by the said bailiff by virtue of a certain writ of execution issued out of the Municipal Court of Chicago in a certain cause in said court wherein Chas. A. Stevens and Bros., a corporation, was plaintiff, and I. Monte Silverberg and Mrs. I. Monte Silverberg were defendants, and which property was in the possession of said bailiff under said levy. The case was tried by the court without a jury and the court found the issues for the plaintiff and that the right to the property described in the plaintiff's statement of claim was in the plaintiff. Judgment was entered on the finding, and this appeal, taken by the defendant Chas. A. Stevens and Bros., a corporation, followed.

The defendant contends that the plaintiff acquired the property from her parents, the judgment debtors, I. Monte Silverberg and his wife, Mrs. I. Monte Silverberg, and that there was no

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[Handwritten signature]

WILLIAM W. BROWN, Sheriff
of the Municipal Court of
Chicago, and JAMES A. BROWN,
and JOHN, a corporation,
Respondents.

BEFORE ME, the undersigned authority, on this day personally appeared

In an action of the first class, in the Municipal Court
of Chicago, James A. Brown, Plaintiff, versus William W. Brown,
Will of the Municipal Court of Chicago, and John, a corporation, and
John, a corporation, defendants, on the first day of January, 1908,
personal property that the claimed belonged to her and which had
been seized upon by the said sheriff by virtue of a certain writ
of execution issued out of the Municipal Court of Chicago in a
certain cause in said court wherein James A. Brown and John,
a corporation, was Plaintiff, and James A. Brown and John, a
corporation, were defendants, and which property was in the
possession of said sheriff under said levy. The same was filed
by the court without a jury and the court found the same for the
Plaintiff and that the right to the property described in the
Plaintiff's statement of claim was in the Plaintiff. Judgment
was entered on the finding, and this appeal, taken by the defendants
James A. Brown and John, a corporation, followed.

The following contents of the Plaintiff's complaint are
properly taken from the judgment and order, to-wit: James A. Brown
and his wife, Mrs. J. Brown, Plaintiff, and John, a corporation,

delivery to the plaintiff and possession remained in the judgment debtors, and that therefore the conveyance of the property from the judgment debtors to the plaintiff was fraudulent per se as to the defendant Chas. A. Stevens and Bros., a corporation. Neither defendant offered any evidence in rebuttal of that introduced by the plaintiff. The trial court found that the plaintiff made out a prima facie case and we agree with this finding. The defendant argues that the evidence tends to prove a conspiracy to defraud the judgment creditor. The trial court stated that he saw nothing irregular or wrong about the transaction by which the plaintiff became the owner of the personal property in question and after a careful reading of the evidence, we have reached the same conclusion. We feel impelled to say that the abstract of record filed by the defendant does not contain all the material evidence introduced on the trial.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

32546

GEORGE P. LEE,

Appellant,

vs.

ROY L. HAMMOND,

Appellee.

249 I.A. 6546

APPEAL FROM MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE SCARLAN DELIVERED THE OPINION OF THE COURT.

On September 29, 1927, in the Municipal Court of Chicago, George P. Lee, plaintiff, obtained a judgment for \$3166.65 against Roy L. Hammond, defendant. On November 12, 1927, leave was given the defendant to file a motion and petition in the nature of a writ of error coram nobis, under section 89 of the Practice Act. The verified petition is as follows:

"J. Samuel Lieberman, represents that he is the attorney for the defendant and that the suit in question is a suit arising out of alleged brokerage commissions, started December, 1925, in which an appearance and jury demand was filed; that on January 12, 1926, after said cause was at issue, the same was placed on the next jury calendar and thereafter, on May 13, an affidavit was filed on behalf of plaintiff to place said cause on the short cause calendar, which was thereafter filed on May 14, 1926, and on May 25, 1926, said matter was placed upon the short cause calendar and set for June 24, 1926; that thereafter, on May 28, 1926, upon notice duly served, a motion was made by defendant to strike said cause from the short cause calendar, which said motion was denied and the plaintiff moved to strike said cause from the short cause calendar, which motion was allowed; that on said May 28, 1926, petitioner was present in open court and heard the announcement made by Judge Charles F. McKinley, one of the judges of the Municipal Court of Chicago, that said cause be stricken from the short cause calendar, and that was the only order directed to the clerk by said Judge McKinley to be entered; that petitioner being familiar with the practice and procedure and believing the clerk would enter the order as directed by the trial judge to strike said cause from the short cause calendar, did nothing further in the matter on that date; that said clerk erroneously and contrary to the order of the trial judge, instead of entering an order striking said cause from the short cause calendar, did add thereon the following: 'and place on Reg. Pl. J. C.', which was not part of the order of the trial judge; that that part of the order 'placing said cause on the Reg. Pl. J. C.' constitutes a fact erroneously placed upon said record, and it would appear from the reading of said order that said cause was stricken from the short cause calendar and placed on the regular place jury calendar, which was not in fact the order of the trial court; that petitioner is familiar with the practice and procedure prevailing in the Municipal Court and that there was a custom long prevailing therein

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Journal of Management Education 24(1)

and 100% of the total sample.

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ST. PETERSBURG, 1871. Printed by the University Press.

Received 10/1/01; accepted 10/1/01; published 10/1/01.

to come to me if notified two weeks in advance of any meeting.

[illegible]

1970-1971 and 1972-1973

1. The first group of people who are interested in the study of the history of the world are the historians. They are people who study the past and try to understand what happened and why it happened. They use a variety of sources, including books, documents, and artifacts, to reconstruct the past. They also try to understand the people who lived in the past and how they thought and felt. Historians are interested in the past for a variety of reasons. Some are interested in the past because they want to know what happened and why it happened. Others are interested in the past because they want to understand the people who lived in the past and how they thought and felt. Still others are interested in the past because they want to learn from the mistakes of the past and avoid them in the future.

1. The first step is to identify the problem or issue that needs to be addressed. This involves gathering information and understanding the context of the problem.

It is noted that the above information was obtained from the records of the Department of Social Services, New York City.

, di qua al bello spettacolo del mare, che si staglia nel cielo.

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

...the above report and also the other two copies of the same report...

10. The following information is being furnished to you for your information only. It is not intended to be used for any other purpose.

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That was the only recent literature in the field of child development that I had read.

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

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1. The first of these is the fact that the majority of the population of the United States is now living in urban areas. This is a result of the process of urbanization, which has been going on since the beginning of the 20th century. The population of the United States has increased from about 100 million in 1900 to over 200 million in 1960. At the same time, the population of rural areas has decreased from about 100 million in 1900 to about 50 million in 1960. This has led to a concentration of the population in urban areas, which has had a number of important consequences for the development of the United States.

[illegible]

1. The first of these is the fact that the majority of the population of the United States is now living in urban areas. This is a result of the process of urbanization, which has been going on since the beginning of the 20th century. The population of the United States has increased from about 100 million in 1900 to over 200 million in 1950. At the same time, the population of rural areas has decreased from about 100 million in 1900 to about 50 million in 1950. This has led to a concentration of the population in urban areas, which has had a number of important consequences. One of the most important is that it has led to a change in the way of life of the majority of the population. In rural areas, the population has traditionally been engaged in agriculture, and the way of life has been based on the needs of the farm. In urban areas, the population has traditionally been engaged in industry and commerce, and the way of life has been based on the needs of the city. This has led to a number of differences between the two ways of life, including differences in the types of housing, the types of food, and the types of entertainment. Another important consequence of urbanization is that it has led to a change in the social structure of the United States. In rural areas, the population has traditionally been organized into small, tight-knit communities. In urban areas, the population has traditionally been organized into large, loose-knit communities. This has led to a number of differences between the two social structures, including differences in the types of social organizations, the types of social activities, and the types of social problems. Finally, urbanization has led to a change in the political structure of the United States. In rural areas, the population has traditionally been organized into small, tight-knit communities. In urban areas, the population has traditionally been organized into large, loose-knit communities. This has led to a number of differences between the two political structures, including differences in the types of political organizations, the types of political activities, and the types of political problems.

7-10-68

that when a cause was stricken from the short cause calendar that the same was not again placed upon the trial calendar without first serving a notice upon the opposite counsel of a motion to place said cause on the regular trial calendar again; that the above entitled cause was upon the regular calendar prior to the motion of plaintiff to place the same on the short cause calendar, and under Section 31 of the Practice Act, which is in words and figures as follows, to-wit: 'If a suit which is placed upon the regular calendar shall be placed upon the "short cause calendar," it shall be stricken off the regular trial calendar and shall not again be placed thereon, except upon notice to all the other parties to the suit, his or their agent or attorney,' when said trial was placed upon the short cause calendar on May 25, 1926, it was ordered that said cause shall be stricken off the regular trial calendar and the clerk erroneously entered the following order: 'Placed on short cause calendar, Room 1121, June 24, 1926, 9:30 A. M.,' but did not include in the order 'striking said cause off the regular trial calendar;' that it now appears of record that the above entitled cause was on both the regular trial calendar and the short cause calendar, when in fact the record, if corrected, should have included the striking of said cause off the regular trial calendar; that it was further provided under said Section 31 that said cause shall not again be placed on the regular trial calendar except upon notice to all other parties to the suit, his or their agent or attorney, and that petitioner was at the time of the entry of all the orders hereinabove referred to and is now the attorney of record, and that he has never received any notice of any kind, nor has any other agent or attorney or the defendant received any notice of the application of a motion to place said cause again on the regular trial calendar; that petitioner had no personal knowledge of the erroneous order entered on May 25, 1926, or of the entry of judgment in the above entitled cause until Saturday, November 6, 1927, when he received a letter from his client from Winton, Minnesota, written on the stationery of Siv, Leouis & Silvertrust, as follows: 'Letter notifying defendant of the entry of judgment on September 23, 1927, and further notifying defendant that unless the same be settled within the next three or four days, execution will be levied upon the property belonging to you, etc.' and your petitioner immediately investigated the files and for the first time learned that the clerk erroneously failed to strike said cause from the regular calendar on May 25, 1926, at the time said cause was placed upon the short cause calendar, and for the first time learned that on May 25, 1926, the clerk erroneously added the following: 'and placed on Reg. Pl. J. C.,' and learned for the first time that an ex parte judgment was entered; that counsel for plaintiff know that defendant had a good and meritorious defense to the whole of said claim and in order to prevent defendant from having his day in court, fraudulently refrained from applying for or issuing any execution, but waited until thirty days elapsed before writing direct to defendant; that defendant has a good and meritorious defense, the nature of which is sworn to under oath by defendant, attached hereto and made part of this petition; prays that an order may be entered correcting the errors apparent of record, viz, the order of May 25, 1926, entered by Judge McKinley, to read: 'Stricken off the regular trial calendar and placed on the short cause calendar, Room 1121, June 24, 1926, 9:30 A. M.,' and correcting further the error of

fact appearing of record on the order of May 28, 1926, to read: 'motion plaintiff to strike cause from short cause calendar allowed,' and to strike from the record the following: 'And placed on Reg. Pl. J. C.,' and further enter an order vacating the judgment entered on September 29, 1927, and set aside the verdict of the jury and striking said cause from the regular jury calendar until plaintiff shall see fit to serve notice upon defendant to place said cause on the regular jury calendar."

Thereafter the plaintiff filed an answer as follows:

"(1) More than thirty days have elapsed since the date at which said judgment was entered and said court has lost jurisdiction on the common law side thereof to vacate, modify or annul the same. (2) That said Municipal Court and Judge McCarthy, who heard said cause and entered said judgment, had full and complete jurisdiction of the subject matter and the parties thereto. (3) That said judgment was not entered by reason of any mistake of fact. (4) That there was in the proceedings in which said law judgment was entered, neither mistake of fact nor of law. (5) That no rule or rules of procedure of the Municipal Court, nor any statute was or were violated by said court at any time in said proceedings. (6) That neither said defendant nor his attorney was deceived nor misled in any way by any of said court officials or by said plaintiff or his attorneys. (7) That said defendant and his attorney were both guilty of the grossest negligence. (8) That said cause was regularly prosecuted, regularly at issue, regularly called, regularly tried and said verdict and judgment entered were in all respects regular."

There was a hearing on the petition and answer, and on December 14, 1927, the court entered an order sustaining the motion and petition of the defendant and vacating the judgment entered September 29, 1927. The plaintiff has appealed from the order of December 14, 1927.

The plaintiff has assigned and argued a number of contentions in support of the appeal, but in our opinion it is only necessary to consider one. The plaintiff contends that the matters alleged in the petition are not such as entitle the defendant to relief by a motion or petition in the nature of a writ of error coram nobis, and in our judgment this contention is a meritless one. The motion of the defendant was made under section 59 of the Practice Act, which abolishes the writ of error coram nobis and provides that all errors in fact committed in the proceedings of any court of record which by common law could have been

corrected by that writ may be corrected by the court in which the error was committed by motion made at any time within five years after the rendition of final judgment in the case. The errors of fact which can be made the basis of such writ have been stated frequently by the appellate courts of this state. (See Marabin v. Thompson Hospital, 309 Ill. 147; Waldron v. Tarpey, 234 Ill. App. 287; People v. Neenan, 278 Ill. 430; McMulty v. White, Ill. App. Ct., Gen. No. 32343; Clark v. Thompson et al., Ill. App. Ct., Gen. No. 31984; Loew v. Krauspe, 320 Ill. 244; Cramer v. Commercial Men's Ass'n, 260 Ill. 516.) None of the matters assigned in the petition constitutes the kind of errors of fact which may be corrected by a motion under section 39 of the Practice Act. The petition, in effect, attempts to impeach the record of the Municipal Court by oral testimony on a motion of error coram nobis. This cannot be done. (See Waldron v. Tarpey, *supra*, and cases cited.)

The judgment of the Municipal Court of Chicago entered December 14, 1927, vacating the judgment order of September 29, 1927, is reversed.

REVERSED.

Gridley, P. J., and Barnes, J., concur.

32580

249 T.A. 655'

W. E. SLAUGHTER, trading as
United Glove Company,
Appellant,

v.

SUPERIOR GLOVE CO., a corporation,
MRS. J. FINKELSTEIN and AARON CHARNY,
Appellees.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

W. E. Slaughter, trading as United Glove Company, plaintiff, sued the Superior Glove Company, a corporation, Mrs. J. Finkelstein and Aaron Charny, defendants, in the Municipal Court of Chicago in an action of the first class. The case was tried before the court with a jury, and at the conclusion of the plaintiff's evidence the court, on motion of the defendants, directed a verdict for the defendants. Judgment was entered on the verdict and this appeal followed.

Omitting the formal parts, plaintiff's statement of claim is as follows:

"Plaintiff's case is for goods, wares and merchandise furnished and delivered to the defendants by the plaintiff in the sum of \$680.89 as follows, to-wit:

June 4, 1920,	Two button machines	\$50.00
	Fonda lining and 6oz.	
	Phoenix lining	486.39
June 29, "	3 bags and 3 Yale locks	39.50
July 12, "	300 Doz. Boys' Gauntlet	
	Lined Gloves delivered to	
	Garson, Pirie, Scott & Co.,	
	as requested by defendants	1125.00

And for money advances and money due and owing by check of the plaintiff to the defendants as follows:

April 5, 1920	Check	450.00
9	"	450.00
May 14	"	200.00
14	"	300.00
June 7	"	700.00
14	"	420.00
24	"	500.00
28	"	333.61
July 1	"	600.00

And that there is now due and owing from the defendants to the plaintiff the sum of \$5634.50 as above set forth, together with interest from July 12, 1920."

The present suit was filed April 13, 1926.

The defendants insisted at the time of the trial that the plaintiff failed to prove his claim as to any of the defendants, but that, in any event, the plaintiff failed to prove that the defendants were jointly liable, and they so contend in this court. It is plain, from a reading of the record, that the second contention is meritorious. The evidence for the plaintiff tends to show that in January, February or March, 1920, he met the defendant Charney and that they had an understanding substantially as follows: The plaintiff had \$5000 worth of wool back khaki jersey on hand, and the defendant Charney said that he would help the plaintiff dispose of this jersey by making automobile gauntlet gloves, and that after some talk the two entered into a "venture," by the terms of which the plaintiff was to furnish the jersey and labor, the defendant "the gauntlets," and the defendant Charney was to sell to the trade the finished product - "automobile gauntlet gloves." Neither the defendant Mrs. Finkelstein nor the Superior Glove Company was a party to this agreement. It would appear from parts of the testimony of the plaintiff that certain of the items in the statement of claim pertain to this "venture," although it is difficult to determine, from the proof, the exact terms of this "venture" and what items in the statement of claim, if any, apply to it.

Some time later, according to the testimony of the plaintiff, the plaintiff entered into a contract with the defendants Charney and Finkelstein. These defendants, apparently, owned most

and that there is now one and only one defendant
in the plaintiff's suit of
as above and below, beginning with January 1, 1900.

The present suit was filed April 15, 1900.

The defendants included at the time of the filing of the
plaintiff failed to prove his claim as to any of the statements, but
first, in any event, the plaintiff failed to prove that the defendant
was jointly liable, and they so contend in this court. It is plain,
from a reading of the record, that the second contention is unfounded.
The evidence for the plaintiff tends to show that in January, February

of 1900, 1901, he was the defendant's partner and that they had an
undivided interest in the business. The plaintiff has shown that
he was not a partner in the business, and the defendant's claim that
he was not a partner in the business is not supported by the evidence.

plaintiff failed, and that after that time the two entered into a
partnership, by the terms of which the plaintiff was to furnish the
money and labor, the defendant "the plaintiff," and the defendant
Garnsey was to sell to the trade the finished product - "unimproved
granite blocks." Neither the defendant Mrs. Winchell nor the

plaintiff's complaint was a party to this agreement. It would
appear from parts of the statement of the plaintiff that certain of
the items in the statement of goods were for the plaintiff.

although it is difficult to determine, from the record, the exact
terms of this "agreement" and what items in the statement of claim
it may apply to.

From this fact, according to the statement of the plain-
tiff, the plaintiff secured these a contract with the defendant
Garnsey and Winchell. These statements, however, would seem

of the stock of the Superior Glove Company, defendant. The plaintiff thus states the contract: "I then made the proposition that if they would increase the capital stock of their company from six thousand dollars to twenty-five thousand dollars, I would take one-third interest in the new company, one-third of the stock and would pay \$8333.33. * * * The Court: May what they said. A. Charney said he agreed. Q. What did Mrs. Finkelstein say? A. Mrs. Finkelstein said, I agree to that proposition." The plaintiff further testified that in fulfillment of this contract he gave to the defendants Finkelstein and Charney the various checks mentioned in the statement of claim as part payment for the stock he was to receive in the company and that they deposited the checks in their bank; that the defendants never increased the capital stock of the company and never turned over to him the stock he was entitled to under the agreement; that the total amount of the checks (\$3953.61) and the first three items in the statement of claim were to apply on account of stock in the Superior Glove Company that he was to receive. In the examination of the plaintiff the following occurred: "Q. Did you expect to get the \$8300.00 in stock? * * * The Witness: A. No, I expected to continue and make payments. Mr. Chatroop (attorney for the defendants): Q. You didn't continue? A. I did not continue." The witness further testified that he did not continue the payments for the reason that the defendants Finkelstein and Charney did not increase the capital stock of the defendant corporation. There is no evidence tending to prove that the defendant corporation was a party to this agreement. In the lower court the following occurred: "The Court: May I ask a question: Are you suing for

breach of contract; failure to deliver the stock? Mr. Clancy (attorney for the plaintiff): Yes, certainly. The Court: Very well, that is the only issue here then. Mr. Chatroop: They cannot sue for a breach of contract under that statement. Mr. Clancy: Why not?" The counsel for the plaintiff takes a different position in this court.

"We have frequently held that under the common law and this statute, where the joint liability is denied by a part of the defendants, the burden of proof, by a plea verified by affidavit, is upon the plaintiff to show the joint liability of all the defendants, including those who failed to file pleas, unless he shall amend his declaration and dismiss the suit as to such of the defendants as are not shown to be jointly liable with the others. (Griffith v. Parry, 30 Ill. 251; Yocum v. Benson, 45 id. 435; Supreme Lodge Ancient Order United Workmen v. Zuhlke, 129 id. 296; Kingsland v. Koeppe, 137 id. 344; Cassady v. Trustees of Schools, 108 id. 560.) It is also well settled that, even in the absence of a plea denying joint liability, the evidence must show such liability as to all of the defendants in order to entitle the plaintiff to a judgment. (Supreme Lodge v. Zuhlke, supra, and cases cited.)" (Powell Co. v. Finn, 198 Ill. 567, 569.)

"Where a declaration or statement of claim charges a joint liability, and one of the defendants shows that he was never liable, a recovery cannot be had against the other without dismissing the defendant not liable and amending the declaration or statement of claim by omitting the charge of joint liability, unless some of the defendants make a personal defense - as infancy, lunacy, bankruptcy or the like." (Umlauf v. Chacamas Trop. Prod. Co., 209 Ill. App. 291, 293. See also Golden Grain Milling Co. v. St. L., S. & F. R. Co., 226 Ill. App. 116, 123.)

In the affidavit of merits the defendant, Superior Glove Company, averred that it had a set-off against the plaintiff in the sum of \$26,484.06, and that it "claims the right to set-off against plaintiff in this suit if plaintiff proceeds against the defendant, Superior Glove Co., alone." When the case was called for trial, the plaintiff "presented a motion to the court that the matters and things set up in the amended affidavit of merits filed in this cause by the

defendants constituted and was an affirmative defense and that the burden was upon the defendants and that they should first proceed.⁹ This motion was overruled by the court and the plaintiff contends that this ruling constituted reversible error. To find no merit in this contention.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

deliberate intention and was an intentional act and the
 person was upon the defendant and that they were in the presence of
 This action was brought by the State and the defendant's conduct
 that this action constituted a criminal offense. It is the will

in this connection.

The judgment of the District Court is affirmed.

Attorney

Attorney

Attorney, V. V., and District, V. V., Attorney.

32647

249 I.A. 655²

ARTHUR M. SLATT and LESLIE M. PRICE,
copartners doing business as Slatt
& Price,

Appellants,

v.

HUGO ANDERSON,

Appellee.

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

In the Superior Court of Cook County, in an action of assumpsit, in a trial before the court with a jury, there was a verdict returned finding the issues for the defendant. Judgment was entered upon the verdict and this appeal followed. The plaintiffs, real estate brokers, were employed by the defendant to procure a purchaser for certain property belonging to the defendant and located at 70th street and Oglesby avenue, Chicago. It is conceded that the only issue of fact which was presented to the jury was whether the plaintiffs had abandoned the deal before the sale was made to the prospective purchaser. From an instruction given on behalf of the defendant it would appear that the latter tried the case on the theory that the testimony on the subject of the alleged abandonment was practically confined to that of the defendant Anderson and the plaintiffs' witness McCarthy, and the defendant here argues that the testimony of Anderson rings true and the testimony of McCarthy does not. On the other hand, the plaintiffs contend that there are significant facts and circumstances in evidence that tend strongly to corroborate the plaintiffs' theory of fact that they had not abandoned the deal before the same was consummated. We are satisfied that the proof on the controverted

question of fact is, to say the least, very close. In such a state of the record it was important that the jury be correctly instructed as to the law.

On behalf of the defendant, the court instructed the jury as follows:

"The jury are instructed that the plaintiffs, Clatt & Price, are required by law to establish their claim in this suit by a preponderance of the evidence, by the greater weight of the evidence.

If, after considering all of the evidence in this case, you should find that the evidence upon any question is equally balanced, you should answer such question against the party who has the burden of such issues, for in such case there would be no preponderance in favor of such proposition.

If, upon the whole cases the jury are in doubt from the evidence as to whether the defendant is indebted to the plaintiffs, or if the evidence leaves the question evenly balanced as to whether the defendant is indebted to the plaintiffs, then your verdict should be for the defendant."

The defendant concedes, as he must, that the above instruction was erroneous. By the first clause of the last paragraph the jury are instructed to find a verdict for the defendant if they "are in doubt from the evidence as to whether the defendant is indebted to the plaintiffs." The language complained of required the plaintiffs to prove their case beyond a doubt, and it placed upon them a heavier burden than is carried by the State in a criminal prosecution, for where the State proves its case beyond a reasonable doubt, it is entitled to a verdict, and the language in question does not even limit the doubt to a reasonable one. In the present suit, even though the jury entertained a doubt as to whether the plaintiffs were entitled to recover, nevertheless, if the plaintiffs proved their case by a preponderance of the evidence they would be entitled to a verdict.

The plaintiffs contend that the court erred in giving to the jury, at the instance of the defendant, the following instruction:

"The court instructs the jury that if the plaintiff said to the defendant that he would have no more to do with the prospect or the deal, the defendant had a right to take him at his word and employ another broker to sell the property if he could to the same prospective purchaser, and under such circumstances the plaintiff would not be entitled to a commission on the sale."

We are of the opinion that there is merit in this contention. The instruction is erroneous because it fails to confine the jury to the evidence in the case. It is also erroneous in that it singles out the evidence of a particular witness and directs a verdict for the defendant if the jury believe that evidence to be true. The instruction was apparently based upon certain evidence of the defendant Anderson, wherein he testified that Mr. McCarthy, a salesman employed by the plaintiffs, came to him and told him that he had a party who made an offer of \$145,000 for the building in question and that that was all that he could get for the building. Anderson further testified: "I said I wouldn't sell less than \$149,500 and I asked him if he wex't go back and see his party once more and he said that he will not. He done all he can do. It is no use. 'I done all I can do,' he says, 'and if you don't want to accept \$145,000, I will have to give up the deal.'" This conversation was denied in tota by Mr. McCarthy, but in addition the plaintiffs contend, and with justification, that there are facts and circumstances in the case that tend strongly to support the claim of the plaintiffs that they did not abandon the deal and that therefore the plaintiffs had the right to have their case determined upon all the evidence. In the closing argument to the jury, counsel for the defendant argued that it was the story of Anderson against the story of McCarthy and that he (the counsel) thought that the court would instruct the jury that

the plaintiffs must prove the story of McCarthy by a preponderance of the evidence. This argument tended to emphasize the aforesaid vice of this instruction. The plaintiffs also contend, and with justification, that the instruction is erroneous for the reason that all the evidence, as well as certain offers of proof, tends to show that Elmore & Company, the other broker, was the agent of Miss Marencoy, the purchaser, and not of the defendant. The defendant makes no attempt to answer the criticisms of this instruction save in one respect, that the error in not confining the jury to the evidence, was cured by other instructions.

The plaintiffs contend that a certain statement made to the jury by counsel for the defendant in the closing argument was highly prejudicial to the plaintiffs. During the closing argument, counsel for the defendant made the following statement: "And yet, now, after this man Andersen, in good faith, has accepted a purchaser and paid the commission, they come in here and want to hit him for another one." Counsel for the plaintiffs objected to this statement and moved that it be stricken out on the ground that there was no testimony to support it. After the court had sustained the objection and stricken out the statement, counsel for the defendant stated that there was evidence that commissions had been paid to another broker, and after the court had repeated its ruling, counsel for the plaintiffs made the following statement to the jury: "Gentlemen, we know he was represented or somebody was represented by another real estate dealer in this matter. Probably the record doesn't show whether a commission was paid." There was no evidence in the record that the defendant had paid commissions to another broker, and the statement complained of was of such a character as was very likely to prejudice the

plaintiffs' rights. The instant case was manifestly not one-sided upon the evidence, and in our opinion it is quite clear that it cannot be seen that the statement did not result in injury to the plaintiffs. After the trial court had sustained the objection to the statement of counsel and had called his attention to the fact that there was no evidence upon which to base the statement, the counsel only aggravated the prejudicial effect of his first statement by his subsequent ones. It would seem as though it was his fixed intention to convey to the jury the impression that commissions had been paid by the defendant to another broker, in spite of the fact that there was no evidence in the record to warrant such a statement and after the court had ruled that his argument was improper. In our opinion the harm of the statements in question was not undone by the conduct of the trial court in the premises.

The plaintiffs have assigned other points in support of their contention that a new trial should be granted, but in our opinion it is not necessary to refer to any of these.

For the reasons stated the judgment of the Superior Court of Cook County is reversed and the cause is remanded.

REVERSED AND REMANDED.

Gridley, P. J., and Barnes, J., concur.

Abstract

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of May, in
the year of our Lord one thousand nine hundred and twenty-eight,
within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. FRANKLIN H. BOGGS, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

249 I.A. 655³

BE IT REMEMBERED, that afterwards, to-wit: On

JUN 27 1928 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:



In the
APPELLATE COURT OF ILLINOIS
Second District

February Term, A.D., 1928.

THE PEOPLE OF THE)	
STATE OF ILLINOIS,)	
Defendants in Error,)	
vs.)	Error
)	County Court
CHARLES CAMERY,)	Lee County.
Plaintiff in Error.)	

OPINION by Boggs, J.

The state's attorney of Lee County filed an information in the County Court against plaintiff in error, consisting of three counts. The first count charged the inlawful possession of intoxicating liquor on June 8, 1927, the second count charged the unlawful sale of intoxicating liquor on said date, and the third count charged unlawful possession on July 9, 1927. On the trial, plaintiff in error was found guilty on the first and second counts. Judgment was rendered on said verdict, and a fine of \$100. was imposed on the first count and \$150. on the second count, with an order of commitment until the fine and costs were paid. To reverse said judgment, this writ of error is prosecuted.

It is first contended that the evidence in the record is not sufficient to warrant said verdict and judgment.

The oral testimony on behalf of the People consisted principally of the testimony of one Harry Baumgartner and one Madalynne Dilkey, paid investigators. Baumgartner testified that he "purchased

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THOMAS BRIDGES
Special Agent
Federal Bureau of Investigation

CHIEF OF POLICE

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several bottles of alcohol from him (plaintiff in error); I purchased one on June 8th, one on June 29th, and one on July 5th, 1927; the first two bottles I turned over to chief deputy sheriff, Mr. Richardson, the other one to the sheriff at the county jail; Madalynne Dilkey was with me when I purchased that liquor June 8th and June 29th; I purchased the liquor on those dates from Charles Camery; I paid him at the rate of \$4.00 a pint."

The witness Madalynne Dilkey testified that she was with Baumgartner "when he called on Charles Camery or met him; bottle marked People's exhibit 1, I saw that bottle on June 8th, 1927; bottle marked People's exhibit 2, I saw that bottle on June 8th, 1927; we purchased it down on the River Road in Dixon, Illinois, from Charles Camery, both bottles. Harry Baumgartner purchased and paid for them.***** I saw bottle marked People's exhibit 3 on June 29th, 1927 at the office of the Dixon Cab Company; it was purchased by Harry Baumgartner from Charles Camery." Baumgartner testified that he and Mrs. Dilkey drank of the liquor so purchased, and that it was intoxicating; that the bottles containing the same were sealed, marked and turned over to the sheriff's force. The evidence discloses that said bottles were in charge of the sheriff's office up until the time of the trial, with the exception of a brief period in which they were turned over to a chemist for the purpose of analyzing the contents thereof. The testimony of the chemist was to the effect that the liquors in question contained 95% alcohol by volume.

The only evidence directly disputing such sales was the testimony of plaintiff in error. He denied ever having sold any intoxicating liquor to either Baumgartner or Mrs. Dilkey. Some three or four witnesses testified to the effect that plaintiff in error's general reputation for being a peaceable and law abiding citizen was good.

One contention made by counsel for plaintiff in error in connection with the sufficiency of the evidence was that the liquor

[illegible][illegible]

which was analyzed and which was offered in evidence, was not sufficiently identified as the liquor alleged to have been purchased from plaintiff in error. Baumgartner identified the liquor in People's exhibits 1 and 2 as being that which he had purchased from plaintiff in error. Fred Richardson, deputy sheriff, testified that People's exhibits 1 and 2 were delivered to him by Baumgartner, and that he had possession thereof continuously until he turned the same over to the chemist to be analyzed, and that after said examination they were returned to him and he had had possession of the same until the time of the trial. The evidence as to the identity of the liquors in question is sufficient to support the verdict.

The law places the determination of the guilt or innocence of a defendant in a criminal case with the jury, and it is only when a reviewing court can say from a consideration of all the testimony there is a reasonable and well-founded doubt of the guilt of the accused, that it is warranted in reversing a judgment on the ground that it is not supported by the evidence. People v. Goldman, 318 Ill. 77-92; Gainey v. People, 97 Ill. 270; Steffy v. People 130 Ill. 98; McCoy v. People, 175 Ill. 224; Lathrop v. People 197 Ill. 169. In People v. Talbe, 321 Ill. 80, the court at page 92, in discussing a question of this character, says:

"We have frequently held that the most important and useful function which a jury is required to perform is to determine on which side of a controversy the real truth lies, where the evidence is thoroughly in conflict as to material facts and is irreconcilable, and that this court is not warranted in reversing the finding of a jury on the facts where no reversible error is shown, even in cases where the finding depends mainly on the testimony of one witness." Citing People v. Gainey, supra; People v. Zurek, 277 Ill. 621.

The evidence is conflicting and under the holding of the

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The law places the determination of the facts in the hands of
the jury, and it is only when
the jury can say from a consideration of all the testimony there
is a well-founded doubt of the guilt of the accused,
that it is warranted in reversing a judgment on the ground that it is
not supported by the evidence. People v. ...
People v. ..., 30 Ill. 2d 111, 1973; People v. ..., 30 Ill. 2d 111, 1973.
People v. ..., 30 Ill. 2d 111, 1973; People v. ..., 30 Ill. 2d 111, 1973.
People v. ..., 30 Ill. 2d 111, 1973; People v. ..., 30 Ill. 2d 111, 1973.
This statement, says:

"We have frequently said that the most important and central
question which a jury is required to answer in the case of a
crime is a controversy the real facts, and the evidence in
the case is in conflict as to what the facts are. In such a case,
the jury is not warranted in reversing a judgment on the ground
that the facts were no reversible error. It is only when the
evidence depends mainly on the testimony of one witness, or
People v. ..., 30 Ill. 2d 111, 1973.
The evidence in a criminal case must be such as to

supreme court in the above cases, we would not be warranted in reversing the judgment on account of the weight of the evidence.

Counsel for plaintiff in error urges most strenuously that the testimony on the part of the People should be discredited, for the reason that the People's witnesses were paid investigators.

The court gave two cautionary instructions on behalf of plaintiff in error in reference thereto. Plaintiff in error's eighteenth instruction is as follows:

"The evidence of professional detectives and policemen upon disputed questions of fact arising in criminal cases should always be received with a large degree of caution. From the nature of their business and their frequent and constant association with members of criminal classes, their minds are often unduly biased and prejudiced against those accused of crime, and in whose arrest they have been instrumental, and their testimony thereby colored against them."

The jury were fully advised with reference to considering the interest or bias of a witness, in determining the weight and credit to be given his testimony.

It does not follow that, because a witness is a paid investigator, his testimony is not to be considered, or that a verdict may not be based thereon. Burns v. People, 45 App. 70-71; People v. Cioppri, 322 Ill. 353-358. The court did not err in overruling the motion for a new trial on the ground that the verdict was not supported by the evidence.

It is next insisted that the court erred in permitting the state's attorney, in the cross examination of one of the character witnesses, to inquire as to whether this witness had not proposed to plaintiff in error that he plead guilty to the charge in said information. The state's attorney was allowed to exceed the proper latitude in said cross examination. However, a large part of this cross examination was made without any objection being interposed thereto. On the whole, we are of the opinion that plaintiff in error was not seriously prejudiced

[illegible]

by the ruling of the court in this connection.

It is also insisted that the verdict and judgment is erroneous, for the reason that a verdict of guilty of unlawful possession and of unlawful sale of intoxicating liquor could have been found against plaintiff in error on the same evidence. This point is not well taken.

Where an indictment charges two or more offenses, parts of one transaction, which are in their nature such that defendant may be guilty of all, it is not required that the state's attorney be put to its election. Goodhue v. People, 97 Ill. 37; Harman v. People, 131 Ill. 594; People v. Warfield, 161 Ill. 293; People v. Mumby, 230 Ill. 32; People v. Pilinski, 293 Ill. 382-385.

No motion was made by counsel for plaintiff in error to compel the state's attorney to elect on which count or counts of the information he would proceed. Plaintiff in error is therefore not in a position to urge said contention. We are not, however, holding that if such motion had been made, the state's attorney should have been required to elect. The record discloses that this was not a case where an election was required to be made.

It is also insisted that the court erred in giving the first and second instructions given on behalf of the people. We have examined said instructions and hold that the objections thereto are not well taken. The court did not err in giving these instructions.

It is next insisted that the court erred in giving the People's fourth instruction. This instruction states a correct principle of law and the court did not err in giving the same.

It is next insisted that the court erred in giving the People's fifth instruction, for the reason that it does not require proof as to sales, etc., on the exact date stated in the information. It was not necessary that such proof be made. The authorities are so uniform on this point that it is not necessary to cite the same.

Lastly, it is insisted that the court erred in giving People's seventh instruction, which is as follows:

"The Jury are instructed that in determining what facts are proved in this case, they should carefully consider all the evidence given before them, with all the circumstances of the transaction in question, as detailed by the witnesses, and they may find any fact to be proved which they think may be rightfully and reasonable inferred from the evidence given in the case, although there may be no direct testimony as to such fact."

The evidence as to said possession and sales being direct it would have been well not to have given this instruction. However, it states a correct principle of law, and plaintiff in error was not prejudiced by the giving of the same.

Finding no reversible error in the record, the judgment of the trial court will be affirmed.

Judgment affirmed.

...the evidence given in the case, although there may be no direct testimony as to what fact."

The evidence as to this proposition and other points is as follows:

Longfellow's *Imagery*

STATE OF ILLINOIS,

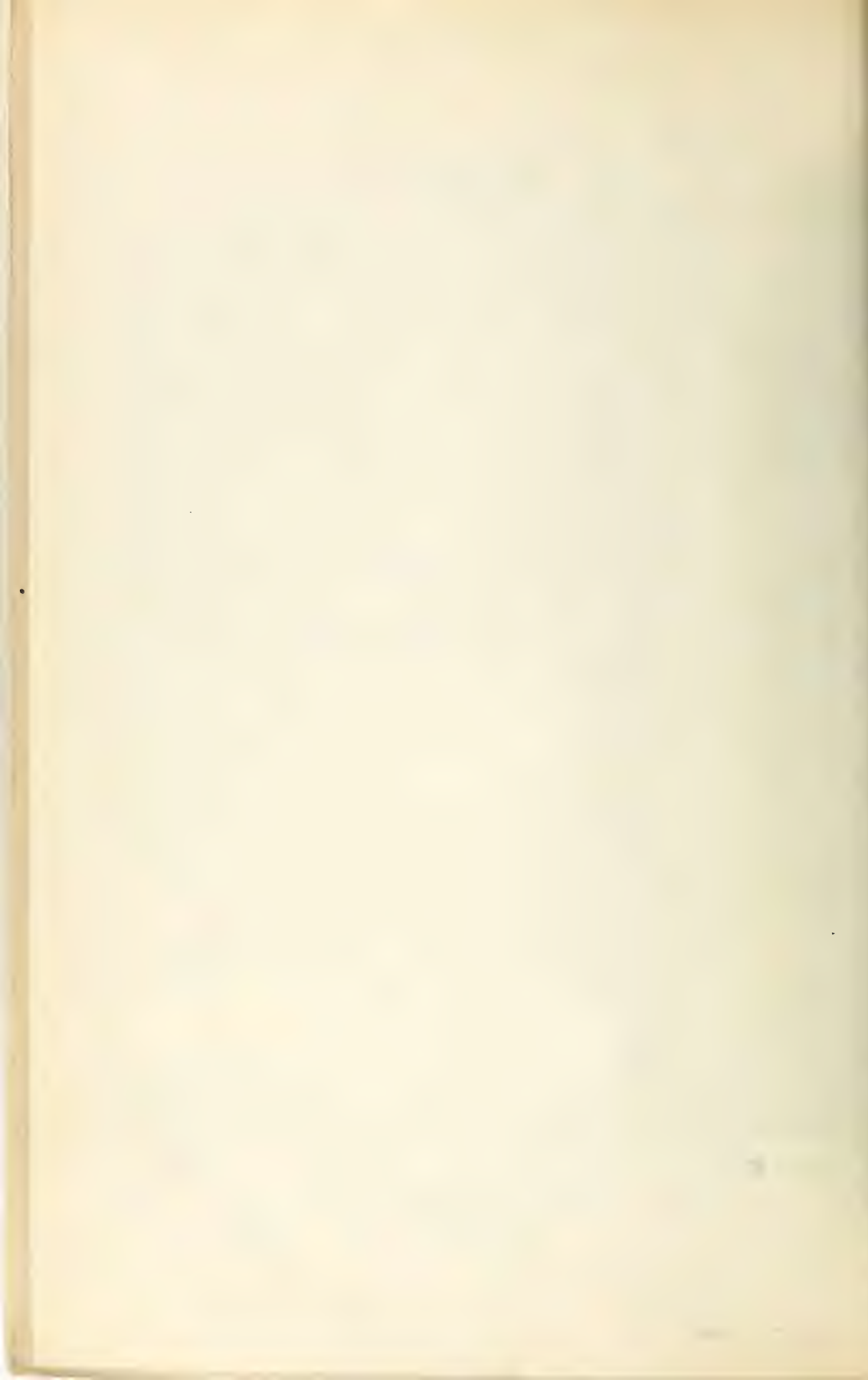
SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-_____

Clerk of the Appellate Court



Postpaid

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of May, in
the year of our Lord one thousand nine hundred and twenty-eight,
within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. FRANKLIN H. BOGGS, Justice.

Hon. THOMAS M. JETT, Justice.

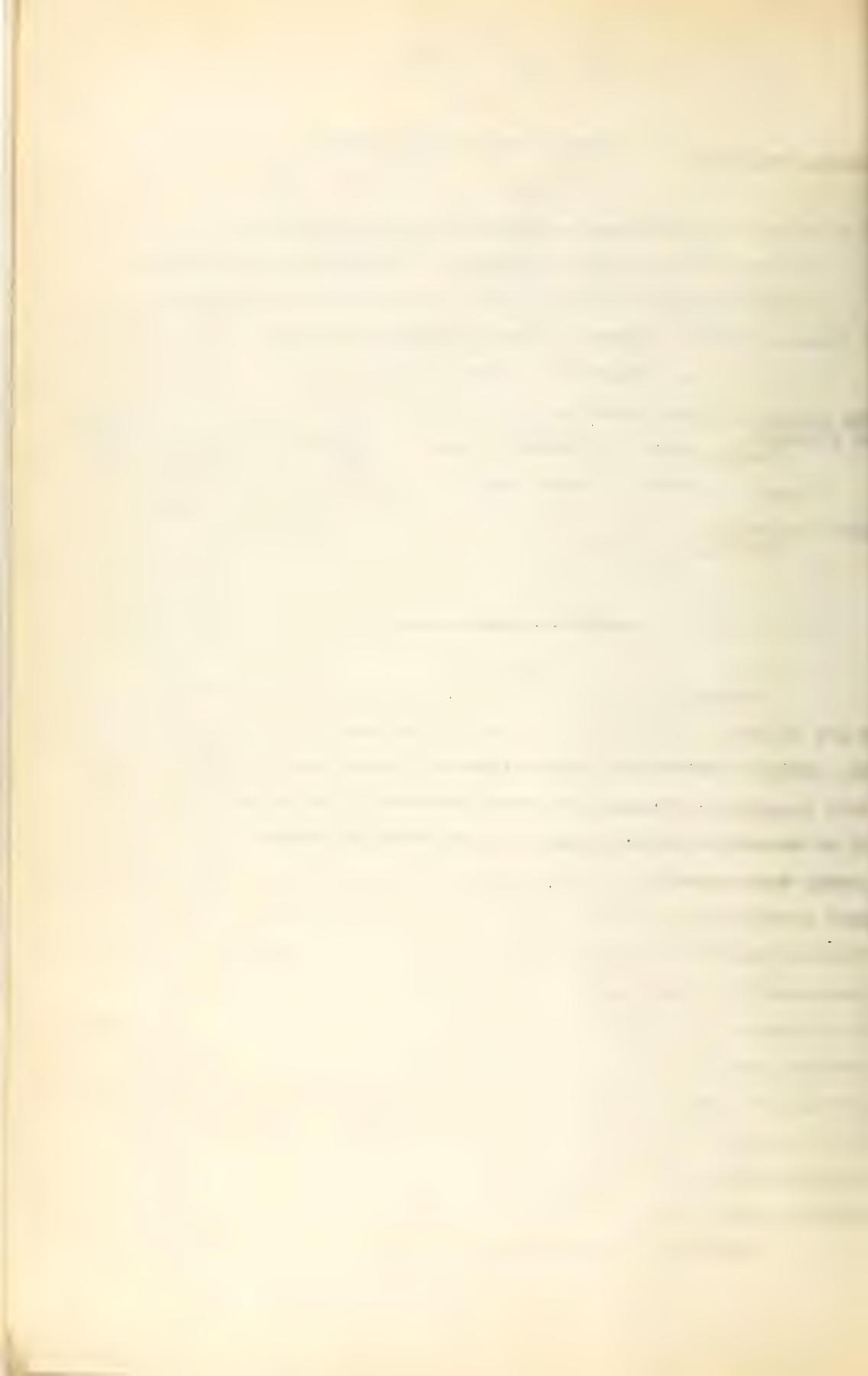
JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

249 I.A. 655⁴

BE IT REMEMBERED, that afterwards, to-wit: On

JUN 27 1928 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:



In the
APPELLATE COURT OF ILLINOIS
Second District.

April Term, A. D., 1928.

THE PEOPLE OF THE STATE
OF ILLINOIS,
Defendant in Error
vs.
ALEXANDER NELSON,
Plaintiff in Error

Writ of Error to County
Court of Henderson County,
Illinois.

OPINION by Boggs, J.

Plaintiff in error was tried and convicted in the County Court of Henderson County on an information charging that on September 25, 1927, he "did then and there unlawfully have in his possession certain intoxicating liquor, which then and there contained more than $\frac{1}{2}$ of 1% of alcohol, by volume, and which was fit for use for beverage purposes, the possession of which said intoxicating liquor was then and there prohibited and unlawful and in violation of section 28 of the Illinois Prohibition Act; said intoxicating liquor being then and there possessed by the said Alexander Nelson with the intent to use the same in violation of the Illinois Prohibition Act, without his then and there having a permit from the Attorney General of the State of Illinois to possess said intoxicating liquor, contrary to the form of the statute," etc. Plaintiff in error was fined \$100. and was ordered committed to the county jail until said fine and costs were paid. To reverse said judgment, this writ of error is prosecuted.

The record discloses that on September 25, 1927, the sheriff

In the

State of Illinois

County of Cook

April 12, 1900

THE PEOPLE OF THE STATE
OF ILLINOIS,
Plaintiff in Error,
vs.
ALEXANDER KILPATRICK,
Defendant in Error.

State of Illinois,
County of Cook,
Jury of the County of Cook,
Illinois.

VERDICT

Plaintiff in error was tried and convicted in the County
Court of Cook County on an indictment charging that on September
12, 1897, he did then and there unlawfully have in his possession cer-
tain intoxicating liquor, which then and there contained more than 1 of
1 of alcohol, by volume, and which was for sale for profit, and
knowingly for possession of which said defendant is now in prison and
has been prohibited and unlawful and in violation of section 12 of the
Illinois Prohibition Act; said intoxicating liquor being then and there
possessed by the said Alexander Kilpatrick with the intent to sell same
in violation of the Illinois Prohibition Act, against all laws and there-
fore a permit from the Attorney General of the State of Illinois to
possess said intoxicating liquor, contrary to the form of the Statute,
etc. Plaintiff in error was fined \$100. and was sentenced to serve in
the county jail until said fine and costs were paid. He never paid
judgment, this writ of error is presented.
The record discloses that on September 12, 1897, the jury

of said county found plaintiff in error and another party in an intoxicated condition, lying along the side of the road some three-quarters of a mile south of Oquawka. Search being made, a pint bottle with some 2½" of liquor therein was found on the person of plaintiff in error. Plaintiff in error was placed under arrest, and the above mentioned information was filed against him.

The testimony on the part of plaintiff in error was to the effect that he and his companion, Charles Opey, had been riding around in an automobile with some other men whose names he did not know; that they had been drinking and when they left the automobile, the other men gave Opey the bottle in question; that he and Opey sat down by the road and Opey told him to take a drink, which he did; that Opey went to sleep and he, plaintiff in error, put the bottle in his pocket and thereafter went to sleep.

It is contended on the part of the plaintiff in error that the giving of People's instructions 2 and 6 was reversible error.

Instruction 2 is as follows:

"The Court instructs you that, under the law of this State, the possession of intoxicating liquor by any person not legally permitted to possess intoxicating liquor, shall be prima facie evidence that such liquor is kept for the purpose of being bartered, furnished or otherwise disposed of in violation of law; it shall not be unlawful to possess intoxicating liquor in one's private dwelling while the same is occupied and used by him as his dwelling only, provided such intoxicating liquor was lawfully acquired and is for the use only of the personal consumption of the owner thereof and his family residing in such dwelling and of his bona fide guests when entertained by him therein, but the burden of proof shall be upon the possessor of any intoxicating liquor, in any action concerning the same, to prove that such liquor was lawfully acquired, possessed and used."

[illegible]

The testimony on the part of Plaintiff in error was to the effect that he and his companion, Charles Opat, had been riding around in an automobile with some other men whose names he did not know; that they had been drinking and when they left the automobile, the other men gave Opat the bottle in question; that he and Opat sat down by the road and Opat told him to take a drink, which he did; that Opat went to sleep and he, Plaintiff in error, put the bottle in his pocket and drove away.

It is estimated that 100,000 to 150,000 people are currently living in the area of the former Soviet Union, and that the number of people living in the area is increasing rapidly.

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* July 1961 - December 1962

The giving of this instruction, the evidence being conflicting, was erroneous. People v. Tate, 316 Ill. 52; People v. Carey, 245 App. 100-108. The court, in People v. Tate, supra, in discussing an instruction of this character at page 59 says:

"This instruction does not state the law, and particularly the last part of it, * * * This placed the burden of proof entirely upon the defendant, and was erroneous. We want to emphasize again that it is improper in a case of this kind, wherein there is a contest on the evidence, under section 40 of the Prohibition Act, as to what constitutes a prima facie case, to inform the jury, in substance, that the defendant, if he makes a defense, must overcome the prima facie case. When a defendant goes to trial and introduces evidence disputing the facts charged in the indictment, it is a question then whether the evidence establishes a case against him of guilt beyond a reasonable doubt. On a contest the question is solely, Have the People established the guilt of the defendant beyond a reasonable doubt?"

Instruction 6 is as follows:

"The Court instructs the jury that the defendant having become a witness in his own behalf became the same as any other witness, and that his testimony should be subjected to the same tests as are legally applied to the testimony of any other witness; that in determining the degree of credibility that should be accorded his testimony, the jury have the right to take into consideration the fact that he is interested in the result of the prosecution; that if, after considering all the evidence in the case, you should find that he has wilfully and corruptly testified falsely to any fact material to the issue in the case, you have the right to disregard his testimony except insofar as it was corroborated by other credible evidence or facts and circumstances appearing in evidence."

This instruction is erroneous in limiting the statement of the law with reference to a witness wilfully testifying falsely on a material

Journal of Interpersonal Violence 27(10)

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tion of this country as far as it goes:

"...and the state has not been able to do it."

THE UNIVERSITY OF CHICAGO LIBRARY

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

SECRET

OF RECORDS & COMMUNICATIONS DIVISION

"The Court instructed the jury that it should not

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© 2000 Blackwell Science Ltd *Journal of Internal Medicine* 247: 391–397

This institution is responsible for the maintenance of the records of the institution.

reference to a specific individual within a set of connections.

matter in issue to the plaintiff in error. If an instruction of this character is given, it should be general, and permit of its application to any witness that the jury may find it applicable to. Other witnesses having testified in this case, the instruction should not have been so limited.

Complaint is also made that the information is duplicitous.

No motion to quash having been made, this point is not well taken.

It is also insisted that the evidence disclosed that plaintiff in error was so intoxicated as to have been incapable of forming an intent, etc. We are not going into the sufficiency of the evidence, as the case will have to be retried.

For the reasons above set forth, the judgment of the trial court will be reversed and the cause will be remanded.

Reversed and remanded.

which is found in the history of the country. It is a very interesting and valuable work, and one of the most important of the kind. It is a very interesting and valuable work, and one of the most important of the kind. It is a very interesting and valuable work, and one of the most important of the kind.

It is a very interesting and valuable work, and one of the most important of the kind. It is a very interesting and valuable work, and one of the most important of the kind. It is a very interesting and valuable work, and one of the most important of the kind. It is a very interesting and valuable work, and one of the most important of the kind. It is a very interesting and valuable work, and one of the most important of the kind.

STATE OF ILLINOIS,

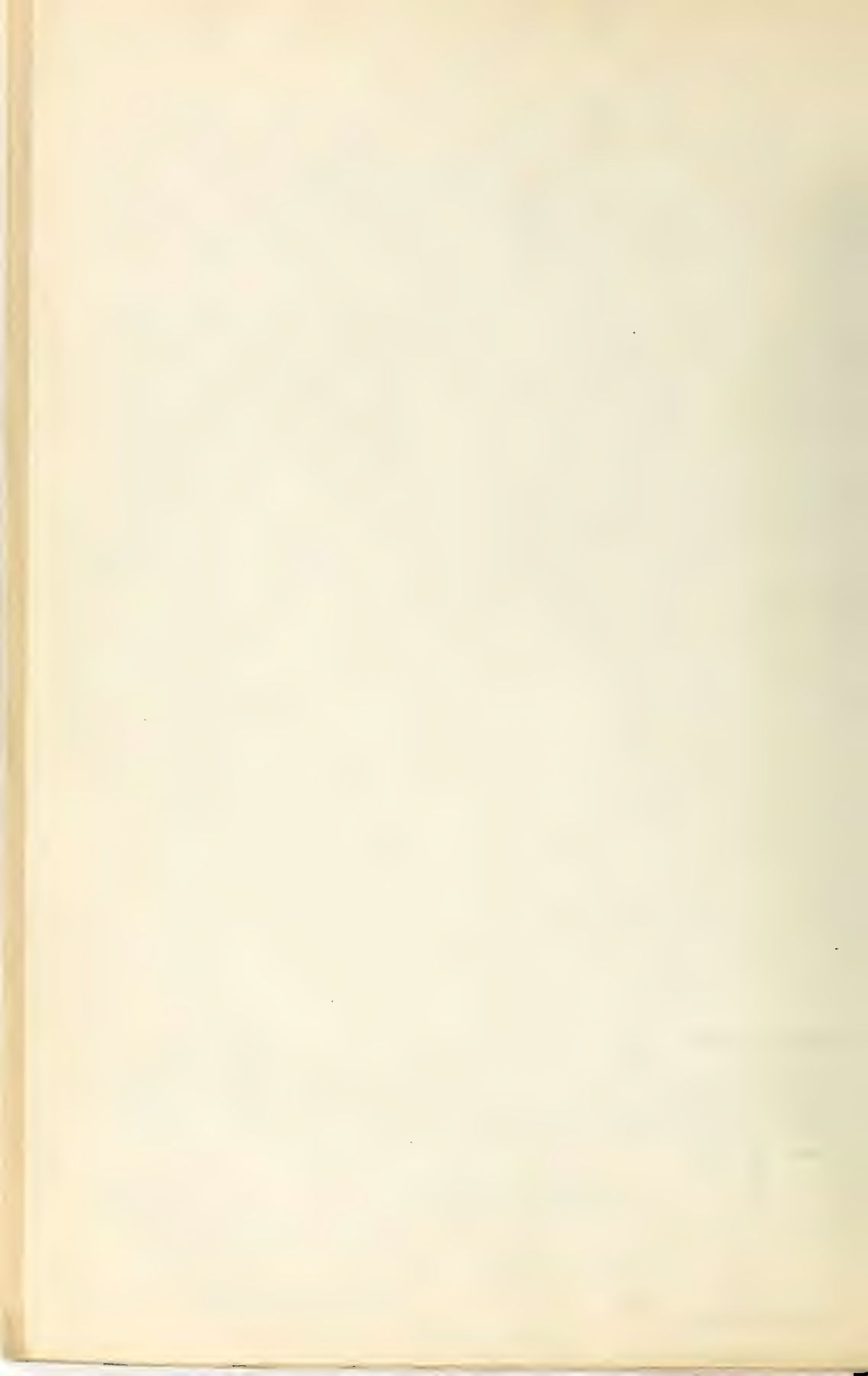
SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-_____

Clerk of the Appellate Court



Abstract
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of May, in
the year of our Lord one thousand nine hundred and twenty-eight,
within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. FRANKLIN H. BOGGS, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

249 I.A. 656¹

BE IT REMEMBERED, that afterwards, to-wit: On

JUN 27 1928

the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:



In the
APPELLATE COURT OF ILLINOIS
Second District

May Term, A. D., 1928.

The People of the State
of Illinois,
Defendant in Error,

vs.

Arthur Jacques,
Plaintiff in Error.

Writ of Error to the
County Court of
Rock Island County,
Illinois.

OPINION by Boggs, J.

At the February Term, 1927, of the County Court of Rock Island County, plaintiff in error was found guilty under an information consisting of three counts, the first of which charged the unlawful manufacture of intoxicating liquors; the second, the unlawful possession of intoxicating liquors; and the third, the maintenance of a nuisance under section 22 of the Illinois Prohibition Act. Judgment was rendered on the verdict, and plaintiff in error was sentenced to six months in the county jail and fined \$500.00 under each count, with a work order, etc. To reverse said judgment, this writ of error is prosecuted.

The first ground relied on for a reversal of said judgment is the overruling of the motion to quash the search warrant sued out in said cause.

A motion was filed in this court by defendant in error to strike that part of the bill of exceptions which purports to set forth the proceedings on the motion to quash said search warrant, on the

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ground that no bill of exceptions was filed at the term at which such proceedings were had and no order was obtained during said term allowing additional time therefor. This motion was taken with the case.

Judgment was entered on May 18, 1927, being one of the regular days of the April Term, at which time plaintiff in error was given sixty days in which to file his bill of exceptions. Said bill of exceptions was finally filed on February 16, 1928, being withⁱⁿ the time subsequently fixed by the court. It was apparently attempted to make the proceedings had on the hearing on the motion to quash said search warrant a part of the bill of exceptions filed February 16, 1928. The entire proceedings on said motion were had at the February Term, 1927. In order to make such proceedings a part of the record, it was necessary either that a bill of exceptions be filed at the February term, 1927, or that an order be entered at said term extending the time therefor. Franklin Park v. Franklin, 208 Ill. 331; City of Chicago v. Harburt, 235 Ill. 304-305; Finn & Co. v. Smith Furnace Co., 245 Ill. 536-539; People v. May, 276 Ill. 332-334; Kimber v. Kimber, 317 Ill. 561-566. The motion to strike that part of the bill of exceptions having to do with the proceedings on the motion to quash said search warrant, should be allowed. City of Chicago v. Harburt, supra, 305; Finn & Co. v. Smith Furnace Co., supra, 537; Illinois Improvement Co. v. Heinzen, 271 Ill. 23-26. It is therefore ordered that such portion of the bill of exceptions be stricken from the files.

No complaint is made of the rulings of the court on the evidence or on the instructions, and it is not contended that the verdict of the jury is against the weight of the evidence. The record discloses that in the basement of a corn crib on the premises of plaintiff in error, two stills, a kerosene stove, and nine barrels of mash were found together with two 50-gallon barrels, a 10-gallon keg and a 5-gallon jug, of intoxicating liquors. It was admitted

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on the trial that the liquors contained more than 50% of alcohol by volume.

It was also contended that the state's attorney, in his opening statement and in the closing argument used language which was prejudicial to plaintiff in error. Plaintiff in error, however, is not in a position to urge this contention for the reason that in his written motion for a new trial, no complaint was made with reference to the conduct of the state's attorney.

When a party files his motion for a new trial and specifies the grounds of his motion, he is confined, on appeal, to those reasons specified and set forth in his motion in the court below, and is held to have waived all causes for a new trial not so stated. West Chicago Street E. E. Co. v. Grubbs, 169 Ill. 585; Antikoon v. Sanner, 136 Ill. 164-170; Jennings v. Burton, 201 Ill. 78-80; Apple v. Glens, 228 Ill. 321-334; People v. Rickers, 326 Ill. 290-292.

Lastly, it is contended that the judgment and sentence of the court is erroneous, for the reason that it in effect imposes a double punishment upon plaintiff in error.

That part of the judgment and sentence complained of is as follows:

"It is further ordered that after the fine and costs are worked out under the first count, the fine and costs under the second count shall then be worked out, and then when the fine and costs under the second count have been worked out, the fine and costs under the third count shall then be worked out; and also ordered that the county superintendent of highways of Rock Island County, Illinois, may confine the said defendant in the county jail of Rock Island County, Illinois, during the night, or at any other time such prisoner cannot be kept at work."

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Under the holding of this court in People v. Barney, 217 App. 322, People v. Hermann, 245 App. 94, People v. Hank, 245 App. 100, the judgment or sentence entered in this cause is erroneous, insofar as it provides for the imprisonment of plaintiff in error in the county jail "during the night or at any other times such prisoner cannot be kept at work." Paragraph 38, chapter 38, Cahill's Statutes, provides that "any keeper of a workhouse, street commissioner, city marshal, or supervisor of roads, or person in whose keeping such convicted person may be placed, may provide for the safekeeping of such person during the time such person may be in his charge, by providing balls and chains and attaching them to such person at any time, and may, if he deems necessary to prevent the escape of such prisoner, confine him in the county jail during the night and at any other time such prisoner cannot be kept at work."

In People v. Hermann, ~~supra~~, in discussing this question, the court at page 98 says:

"In making the order for payment in labor, in default of payment in money, the court has confused the provisions of section 290, Cahill's St. Ch. 38, par. 383, with those of section 391, Cahill's St. Ch. 38, par. 384. This order should have followed section 391. It should have directed that defendant work out such fine and all costs: (a) In the workhouse of the city, town or county, or (b) in the streets and alleys of the city or town, or (c) on the public roads in the county under the proper person in charge of such work house, streets, alleys or public roads, at the rate of \$1.50 per day. Then the 'proper person,' in whose keeping the order placed her, could provide for her safe-keeping by the use of balls and chains and, if he deemed it necessary to prevent her escape, he could confine her in jail during the night, and at any other time she could not be kept at work, as provided in section 392, chapter 38."

[illegible]

This court in the above cited cases, went into this question so fully that it is not necessary for us to further discuss the same. The judgment as entered was contrary to the statute, and the cause will be reversed and remanded to the County Court of Rock Island County, with directions to enter a judgment and decree in accordance with the statute and the views herein expressed.

Reversed and remanded, with directions.

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STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-_____

Clerk of the Appellate Court

Chapman
to

Abstract

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of May, in
the year of our Lord one thousand nine hundred and twenty-eight,
within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. FRANKLIN H. BOGGS, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

249 I.A. 656²

BE IT REMEMBERED, that afterwards, to-wit: On
JUN 27 1928 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:



THE PEOPLE OF THE STATE OF :
 ILLINOIS AT THE RELATION :
 OF MABLE SHAFFER, :
 APPELLANT. :
 V S. :
 JOHN DOUBET, :
 APPELLANT. :

APPEAL FROM THE COUNTY
 COURT OF KNOX COUNTY.

Sett J.

This is an appeal prosecuted by John Doubet, appellant, from a judgment rendered against him in the County Court of Knox County, in a bastardy proceeding in which he had been found to be the father of the child of Mable Shaffer.

The record discloses that Mable Shaffer on the 16th day of April, 1926, appeared before Helen M. Carr, a Justice of the Peace of Knox County, and made a complaint that the appellant was the father of the child to which she had given birth. A warrant was issued for his arrest, which was executed. A hearing was waived and appellant gave bond for his presence at the next August Term 1926, of the County Court of Knox County to answer the charge of bastardy. Subsequently a trial was had and the jury returned a verdict finding that John Doubet was the father of the child of the prosecuting witness; judgment was rendered thereon and this appeal followed.

The record discloses that Mable Shaffer testified that on the 29th day of March, 1925, she went down into a pasture belonging to John Doubet; that John Doubet lived about a quarter of a mile east of her home; that she went into the pasture to obtain the release of her collie dog; which she heard barking, and which had been shut in the field on the premises of John Doubet; that after she had let the dog out of the field she met John Doubet in the pasture; that prior to that time she had seldom talked with him, but that on this particular day about four o'clock in the afternoon within 15 or 20 minutes after she met him, he threw her on the ground and

forced her to have sexual intercourse with him, and it was the first and only time she ever had sexual intercourse with John Doubet. She further testified that after the intercourse she went directly home and made no complaint to any one, and never talked the matter over with any one until after the child was born on December 27th, 1925. On the part of the relator, Dr. Long testified that a child was born to Mable Shaffer on the 27th of December, 1925, and that it was a healthy normal child. This is all the testimony that was offered in the first instance on the part of appellee. John Doubet testified that he did not have sexual intercourse with Mable Shaffer on the 22 of March, 1925, or at any other time; that he was never with her at any time or place; that he and his wife were entertaining his brother and sister-in-law, in his home at the very time the prosecuting witness claims the act was committed; and that he was not in the pasture at any time during the afternoon of March 22th, 1925, and that Mable Shaffer never communicated with him at any time in regard to the child. He testified that the Shaffer family, of which Mable Shaffer was a member, moved to the farm about one quarter of a mile west of his place about a month prior to March 22th, 1925. On the part of appellant, Stephen Doubet and Mrs. Stephen Doubet testified that John Doubet was in their presence at the time complained of, and long before and long after the time as fixed by the said Mable Shaffer.

Harry Blane, a witness called by appellant testified that he went to work for Hannah Doubet, mother of John Doubet, in the spring of 1925; that on Easter Sunday, April 12, 1925 he met Mable Shaffer; that on the evening of that day he went riding with her in a car, and that they both alighted therefrom, and he had sexual intercourse with her by the roadside some distance to the rear of the car; that on Wednesday evening next following Easter Sunday he again went riding with Mable Shaffer and had sexual

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intercourse with her and on Saturday next following Easter Sunday he met her at about 5:00 O'clock in the afternoon and at that time had sexual intercourse with her in a lane not frequently used, and that he continued to have sexual intercourse with her at various times from then up to and including November, 1925; that in November, 1925, he noticed a change in Mable Shaffer's appearance, and he asked her if she was in a family way and she said "You need not worry, I am not going to stick you, I am not going to get Albert, he won't have me, I am going to get some one with money."

Albert Doubet, brother of the defendant, testified that he and one Lena Knox went riding with Harry Slane and Mable Shaffer on the evening of Easter Sunday, in April, 1925, that Harry Slane and Mable Shaffer got out of the car and remained some distance back of them for sometime; that during the spring, summer and fall of 1925, he saw Harry Slane with Mable Shaffer several times, and that he saw them together at different places.

Hornah Doubet, mother of the defendant, testified that Harry Slane started to work for her in the spring of 1925, and not later than March 25th. The record discloses also, that Ernest Shaffer and John Swigert testified on behalf of appellee, that they did not see Harry Slane around the Doubet place until the latter part of May, 1925.

Mable Shaffer was called to re-buttal and she denied telling Harry Slane in November, 1925, that she was in a family way. She testified no one knew of her being in a family way until the child was born. She denied having had sexual intercourse with Harry Slane but admitted that she had gone out riding in a car with Slane, Albert Doubet and Lena Knox, but fixed the time as being on a different date from that fixed by Slane, Doubet and Knox. She also testified that on several occasions when she was out riding with Slane, Doubet and Knox, some of them would get out and

[illegible]

sit on the ground so that they could not be watching each other.

There is evidence in the record of Dr. Bohan, to the effect that the period of gestation for a full period child, could vary, and that he did not believe any one could answer definitely; that the average time of gestation is 272 days to 275 days; that the longest period of gestation was about 321 days, and the shortest period for a healthy normal child was from six to seven months.

From the testimony of Mable Shaffer it will be observed that she claimed that the appellant had sexual intercourse with her on the 29th of March, 1925. The record discloses that the complaint was filed charging appellant with being the father of the child in question, on the 16th day of April, 1926. The child was born on the 27th of December, 1925, more than three months before the appellant was charged with being the father of the child, and before the complaint was filed.

It is urged that the complaint is insufficient and that the verdict is against the manifest weight of the evidence.

Appellant went to trial without objection to the complaint, after having entered a plea of not guilty. We are of the opinion he waived all objection to the complaint. People vs. Kuhling 231 Ill. App.256.

As to the second reason assigned for reversal, a more serious question arises. The suit of appellee is based almost entirely upon the testimony of Mable Shaffer, and there is no other evidence in this record on which to sustain the verdict of the jury. The rule is, that the prosecution must prove the case by the greater weight of the evidence. The prosecuting witness Mable Shaffer, details a state of facts that are not calculated to carry conviction in view of what is disclosed in this record. She had but a casual acquaintance with appellant; that on the day in question within 15 or 20 minutes after their meeting, she was thrown to the ground and improper relations had;

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The agreement was changed with effect from 1 January 1992.

...and the ...

It is hereby certified that the foregoing is a true and correct copy of the original as the same appears in the records of the Department of the Interior.

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1967-1968, 1969-1970, 1971-1972, 1973-1974, 1975-1976, 1977-1978, 1979-1980, 1981-1982, 1983-1984, 1985-1986, 1987-1988, 1989-1990, 1991-1992, 1993-1994, 1995-1996, 1997-1998, 1999-2000, 2001-2002, 2003-2004, 2005-2006, 2007-2008, 2009-2010, 2011-2012, 2013-2014, 2015-2016, 2017-2018, 2019-2020, 2021-2022, 2023-2024, 2025-2026, 2027-2028, 2029-2030, 2031-2032, 2033-2034, 2035-2036, 2037-2038, 2039-2040, 2041-2042, 2043-2044, 2045-2046, 2047-2048, 2049-2050, 2051-2052, 2053-2054, 2055-2056, 2057-2058, 2059-2060, 2061-2062, 2063-2064, 2065-2066, 2067-2068, 2069-2070, 2071-2072, 2073-2074, 2075-2076, 2077-2078, 2079-2080, 2081-2082, 2083-2084, 2085-2086, 2087-2088, 2089-2090, 2091-2092, 2093-2094, 2095-2096, 2097-2098, 2099-2100, 2101-2102, 2103-2104, 2105-2106, 2107-2108, 2109-2110, 2111-2112, 2113-2114, 2115-2116, 2117-2118, 2119-2120, 2121-2122, 2123-2124, 2125-2126, 2127-2128, 2129-2130, 2131-2132, 2133-2134, 2135-2136, 2137-2138, 2139-2140, 2141-2142, 2143-2144, 2145-2146, 2147-2148, 2149-2150, 2151-2152, 2153-2154, 2155-2156, 2157-2158, 2159-2160, 2161-2162, 2163-2164, 2165-2166, 2167-2168, 2169-2170, 2171-2172, 2173-2174, 2175-2176, 2177-2178, 2179-2180, 2181-2182, 2183-2184, 2185-2186, 2187-2188, 2189-2190, 2191-2192, 2193-2194, 2195-2196, 2197-2198, 2199-2200, 2201-2202, 2203-2204, 2205-2206, 2207-2208, 2209-2210, 2211-2212, 2213-2214, 2215-2216, 2217-2218, 2219-2220, 2221-2222, 2223-2224, 2225-2226, 2227-2228, 2229-2230, 2231-2232, 2233-2234, 2235-2236, 2237-2238, 2239-2240, 2241-2242, 2243-2244, 2245-2246, 2247-2248, 2249-2250, 2251-2252, 2253-2254, 2255-2256, 2257-2258, 2259-2260, 2261-2262, 2263-2264, 2265-2266, 2267-2268, 2269-2270, 2271-2272, 2273-2274, 2275-2276, 2277-2278, 2279-2280, 2281-2282, 2283-2284, 2285-2286, 2287-2288, 2289-2290, 2291-2292, 2293-2294, 2295-2296, 2297-2298, 2299-2300, 2301-2302, 2303-2304, 2305-2306, 2307-2308, 2309-2310, 2311-2312, 2313-2314, 2315-2316, 2317-2318, 2319-2320, 2321-2322, 2323-2324, 2325-2326, 2327-2328, 2329-2330, 2331-2332, 2333-2334, 2335-2336, 2337-2338, 2339-2340, 2341-2342, 2343-2344, 2345-2346, 2347-2348, 2349-2350, 2351-2352, 2353-2354, 2355-2356, 2357-2358, 2359-2360, 2361-2362, 2363-2364, 2365-2366, 2367-2368, 2369-2370, 2371-2372, 2373-2374, 2375-2376, 2377-2378, 2379-2380, 2381-2382, 2383-2384, 2385-2386, 2387-2388, 2389-2390, 2391-2392, 2393-2394, 2395-2396, 2397-2398, 2399-2400, 2401-2402, 2403-2404, 2405-2406, 2407-2408, 2409-2410, 2411-2412, 2413-2414, 2415-2416, 2417-2418, 2419-2420, 2421-2422, 2423-2424, 2425-2426, 2427-2428, 2429-2430, 2431-2432, 2433-2434, 2435-2436, 2437-2438, 2439-2440, 2441-2442, 2443-2444, 2445-2446, 2447-2448, 2449-2450, 2451-2452, 2453-2454, 2455-2456, 2457-2458, 2459-2460, 2461-2462, 2463-2464, 2465-2466, 2467-2468, 2469-2470, 2471-2472, 2473-2474, 2475-2476, 2477-2478, 2479-2480, 2481-2482, 2483-2484, 2485-2486, 2487-2488, 2489-2490, 2491-2492, 2493-2494, 2495-2496, 2497-2498, 2499-2500, 2501-2502, 2503-2504, 2505-2506, 2507-2508, 2509-2510, 2511-2512, 2513-2514, 2515-2516, 2517-2518, 2519-2520, 2521-2522, 2523-2524, 2525-2526, 2527-2528, 2529-2530, 2531-2532, 2533-2534, 2535-2536, 2537-2538, 2539-2540, 2541-2542, 2543-2544, 2545-2546, 2547-2548, 2549-2550, 2551-2552, 2553-2554, 2555-2556, 2557-2558, 2559-2560, 2561-2562, 2563-2564, 2565-2566, 2567-2568, 2569-2570, 2571-2572, 2573-2574, 2575-2576, 2577-2578, 2579-2580, 2581-2582, 2583-2584, 2585-2586, 2587-2588, 2589-2590, 2591-2592, 2593-2594, 2595-2596, 2597-2598, 2599-2600, 2601-2602, 2603-2604, 2605-2606, 2607-2608, 2609-2610, 2611-2612, 2613-2614, 2615-2616, 2617-2618, 2619-2620, 2621-2622, 2623-2624, 2625-2626, 2627-2628, 2629-2630, 2631-2632, 2633-2634, 2635-2636, 2637-2638, 2639-2640, 2641-2642, 2643-2644, 2645-2646, 2647-2648, 2649-2650, 2651-2652, 2653-2654, 2655-2656, 2657-2658, 2659-2660, 2661-2662, 2663-2664, 2665-2666, 2667-2668, 2669-2670, 2671-2672, 2673-2674, 2675-2676, 2677-2678, 2679-2680, 2681-2682, 2683-2684, 2685-2686, 2687-2688, 2689-2690, 2691-2692, 2693-2694, 2695-2696, 2697-2698, 2699-2700, 2701-2702, 2703-2704, 2705-2706, 2707-2708, 2709-2710, 27

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FIG. 2. Diagram of the experimental setup.

From a list of references to this case, several military agencies

to at least one, if not all, of the following categories:

16. The above information is being furnished to you for your information only and is not to be used for any other purpose.

Page 100 of 100

... ..

Indicate the full name of the student, the test score

1. The first step in the process of identifying a problem is to define the problem clearly and concisely. This involves identifying the specific issue or situation that is causing concern and determining the scope and impact of the problem. It is important to gather relevant information and data to understand the problem fully and to identify the stakeholders who are affected by it.

[illegible]

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1960-1961 - covered an interval of one year.

that she immediately went home and made no complaint; that she never talked with any one about the condition in which she found herself until after the child was born; that the complaint finally made was more than three months after the birth of the child, Taking into consideration all the facts, both for appellant and appellee, the question is where does this case fall? In the case of the People -vs- Cutler, 200 Ill. App. 469, it is held that it is incumbent upon the prosecution to establish a charge of bastardy by the weight of the evidence. That in bastardy proceedings, where the only testimony on behalf of the plaintiff was that of the prosecuting witness that the defendant had intercourse with her and was the father of her child, which was denied by the defendant and there was the testimony of other unimpeached witnesses on behalf of the defendant, strongly militating against the charge of paternity; it was held that a verdict finding the defendant to be the father of the child was against the weight of the evidence.

On the part of appellee, this case must stand or fall upon the testimony of Mable Shaffer. The defendant denied that he ever had intercourse with her. The testimony of Stephen Doubet and Mrs. Stephen Doubet sustained him as to being at his home at the time that Mable Shaffer claims the intercourse took place in the pasture.

In People vs. Lamberg 160 Ill. App. 644, the prosecuting witness testified that she had intercourse with the defendant in February and March 1908; that she did not have intercourse with any other man during these months. Witnesses called for the defendant testified that they had intercourse with her in February, 1908. The prosecuting witness denied the statement and the court held, "Taking all of her testimony together, the testimony of the relatrix that the defendant was the father of her child, was but the statement of an inference from the facts

stated by her that she had intercourse with him, and only with him about the time that the child was begotten, and there is no evidence tending to prove any other fact as the basis of such inference. If she had intercourse with one other than the defendant about the time the child was begotten, there was in her testimony no basis for the inference stated by her, or from which the jury might probably draw the inference that the defendant was the father of her child." The judgment in the above last cited case was set aside because the verdict of the jury was against the weight of the evidence. In *People vs. Nason* 161 Ill. App. 29, the evidence relied on for a conviction was that of the prosecuting witness, and her statements were denied by the defendant. The judgment was reversed and the cause remanded because the finding was manifestly against the preponderance of the evidence. In its decision of the case, the court among other things said, "It is also somewhat remarkable that with all her opportunities, she never spoke to the defendant on the subject."

In the case at bar it certainly is remarkable that the prosecuting witness never spoke to the defendant or any one about her condition until after the child was born. It is contrary to human experience that the prosecuting witness should have gone through her entire period of pregnancy without mentioning her condition to any one, and without evidencing a condition to have brought about discussion in her immediate family.

In conclusion, in view of the state of the record, the judgment of the County Court of Knox County is reversed and the cause is remanded.

Reversed and remanded.

[illegible]

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-_____

Clerk of the Appellate Court

Abstract
6879a
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of May, in
the year of our Lord one thousand nine hundred and twenty-eight,
within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. FRANKLIN H. BOGGS, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

249 I.A. 656³

BE IT REMEMBERED, that afterwards, to-wit: On

JUL 12 1928 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

In The
APPELLATE COURT OF ILLINOIS
Second District.

February Term, A.D., 1928.

HARRY ZELDEN,
Plaintiff in Error,)
vs.)
COMMERCIAL UNION ASSURANCE)
COMPANY, a Corporation,)
Defendant in Error.)

Writ of Error to
the Circuit Court
of Woodford County.

OPINION by BOGGS, J.

Plaintiff in error, hereinafter referred to as plaintiff, instituted suit in the Circuit Court of Woodford County against defendant in error, hereinafter referred to as defendant, upon a policy of fire insurance in the total amount of \$1,100, the building and contents insured thereby having been totally destroyed by fire. A jury was waived, and upon a trial by the court, judgment was rendered against defendant for \$1,100. The cause was appealed to this court, and at the April term, 1925, an opinion was filed, reversing and remanding the cause for error in the trial court sustaining plaintiff's demurrer to certain special pleas.

The cause was reinstated and on January 18, 1926, an order was entered by the Circuit Court overruling the demurrer to said special pleas. Plaintiff electing to abide his demurrer, judgment was rendered against him, in bar of action and for costs. To reverse said judgment, this writ of error is prosecuted.

The assignment of errors is as follows:

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UNCLASSIFIED
DATE 08-01-2001
BY 60322 UCBAW

*A. *Univariate analysis*

Plaintiff in error, hereinafter referred to as Plaintiff, instituted suit in the Circuit Court of Cook County against defendant in error, hereinafter referred to as Defendant, upon a policy of fire insurance in the total amount of \$1,100, the policy and proceeds insured thereby having been totally destroyed by fire. A trial was waived, and upon a trial by the court, judgment was rendered against defendant for \$1,100. The cause was appealed to this court, and at the April term, 1938, an opinion was filed, reversing and annulling the cause for error in the trial court mentioned in Plaintiff's brief.

The course was maintained and on January 12, 1961, an order was entered by the Circuit Court overruling the decision in said case. Plaintiff's attempt to make his demand, judgment was rendered against him, in favor of action and for costs. The court said that this was an error and is reversed.

The assignment of one to two is as follows:

1. That the trial court erred in overruling the demurrer to said special pleas.

2. That the plaintiff, having elected to abide his demurrer to said special pleas, the court erred in rendering judgment thereon.

3. That the court erred in not holding that defendant had waived compliance with the provisions of said policy with reference to proof of loss.

4. That the issue as to whether or not a sworn statement had been furnished defendant by plaintiff was disposed of by the court without a trial on the merits.

5. That the ruling of the trial court was contrary to the mandate of this court on the prior review.

6. That the judgment was without authority of law.

7. That the findings, order and judgment of this court on the prior review "were and are and each of them was and is contrary to and against the law governing said case."

8. That the mandate of this court on the former review "was and is contrary to and against the law governing said case."

On the review of this case on the former appeal, this court in detail went into the pleadings and the rulings of the trial court thereon. An examination of said opinion will disclose that special pleas had been filed to certain additional counts. A demurrer to said pleas had been sustained by the trial court, and it was on account of the ruling thereon that said cause was reversed and remanded. Among other things, we there said:

"To the additional counts appellant filed a plea of the general issue and three special pleas. Appellee filed a similitur to the plea of the general issue and a demurrer to each of the three special pleas, which demurrers were sustained. Appellant then filed three amended special pleas, to which demurrers were sustained, and appellant elected to abide by its pleas.

1. That the trial court erred in overruling the demurrer to said special pleas.

2. That the plaintiff, having elected to join its demurrer to said special pleas, the court erred in rendering judgment thereon.

3. That the court erred in not holding that defendant had actual compliance with the provisions of said bill, this judgment is great of loss.

4. That the issue as to whether or not a sworn statement had been furnished defendant by plaintiff was disposed of by the court without a trial on the merits.

5. That the finding of the trial court was contrary to the mandate of this court on the prior review.

6. That the judgment was without authority of law.

7. That the findings, order and judgment of this court on the prior review "were and are and each of them was and is contrary to and against the law governing said case."

8. That the mandate of this court on the former review "was and is contrary to and against the law governing said case."

9. The review of this case on the former appeal, this court in detail went into the pleadings and the findings of the trial court thereon. An examination of said opinion will disclose that special pleas had been filed to certain additional counts. A demurrer to said pleas had been sustained by the trial court, and it was on account of the ruling thereon that said cause was reversed and remanded. Among other things, we there said:

"To the additional counts appellant filed a plea of the non-availability of issue and three special pleas. Appellee filed a similar plea to the plea of the general issue and a demurrer to each of the three special pleas, which demurrers were sustained. Appellant then filed three amended special pleas, to which demurrers were sustained, and appellant elected to abide by its pleas."

"The principal question in this case is as to the sufficiency of the first amended plea, which alleged that no suit or cause of action was started until July 27, 1923, when the amended declaration was filed, and also not until the additional counts were filed on December 10, 1923; that the declaration alleged the fire occurred on May 6, 1921, and that no suit was started on said policy until more than twelve months after the fire, setting out a provision of the policy prohibiting any suit unless commenced within twelve months after the fire.

"Appellant contends that because the original declaration did not allege the specific date when notice of the fire was sent to appellant, which under the terms of the policy was to be given within a reasonable time; and the specific date when proof of loss was made, which under the policy was to be made within sixty days of the date of the fire, that the declaration did not state a cause of action, and that the additional counts which supplied these defects and alleged the waiver set out a new cause of action, and were filed after the cause of action was barred by the Statute of Limitations. Appellee contends that the trial court did not err in sustaining the demurrer to this first amended plea, but that the declaration was a defective statement of a cause of action; that neither of the counts in the amended declaration nor the additional count stated a new cause of action; that the cause of action in each of the counts declared upon the same insurance policy, the same loss, the same notice, and the same proof as declared upon in the original declaration, and for this reason the cause of action was not barred by the Statute of Limitation, and for that reason the demurrer to the first amended plea was properly sustained.

"Many cases have been cited on the question of the necessity of alleging a waiver of a proof of loss when such waiver is relied upon to excuse a failure to make a proof of loss. The cases cited are not uniform in their holdings. The following cases hold that the waiver need not be specifically alleged, but may be proved under an issue

"The principal question in this case is as to the sufficiency of the first amended plea, which alleged that no suit or cause of action was started until July 23, 1923, when the amended declaration was filed, and also not until the additional counts were filed on December 10, 1923; that the declaration alleged the fire occurred on May 6, 1921, and that no suit was started on said policy until more than twelve months after the fire, setting out a provision of the policy prohibiting any suit more than twelve months after the fire.

"Appellant contends that because the original declaration did not allege the specific date when notice of the fire was given to the insurer, which under the terms of the policy was to be given within a reasonable time; and the specific date when proof of loss was made, which under the policy was to be made within sixty days of the date of the fire, that the declaration did not state a cause of action, and that the additional counts which applied these dates and alleged the waiver set out a new cause of action, and were filed after the cause of action was barred by the statute of limitation. Appellee contends that the trial court did not err in sustaining the demurrer to this first amended plea, but that the declaration was a defective statement of a cause of action; that neither of the counts in the amended declaration nor the additional count stated a new cause of action; that the cause of action in each of the counts declared upon the same insurance policy, the same loss, the same notice, and the same proof as declared upon in the original declaration, and for this reason the cause of action was not barred by the statute of limitation, and for that reason the demurrer to the first amended plea was properly sustained.

"Many cases have been cited on the question of the necessity of alleging a waiver of a proof of loss when such waiver is relied upon to excuse a failure to make a proof of loss. The cases cited are not uniform in their holdings. The following cases hold that the waiver need not be specifically alleged, but may be proved under an issue

alleging performance of all of the terms of the policy. (German Fire Insurance Co. v. Grunert, 112 Ill. 68; Evans v. Howell, 211 Ill. 85; Gray v. Merchants Insurance Co., 125 Ill. App. 374; Rosater v. Peoria Life Assn., 149 Ill. App. 536; Harvick v. Modern Woodmen, 158 Ill. App. 570; Downs v. Michigan Commercial Ins. Co., 157 Ill. App. 32; Funk v. Fire Association, 157 Ill. App. 602; Briggs v. Bankers Insurance Co., 214 Ill. App. 187.)

"All doubt as to the rule, however, has been settled by the Supreme Court in the recent case of Ieder v. Midland Casualty Co., 316 Ill. 552. There the cases are fully reviewed; German Fire Insurance Company v. Grunert, supra, and Evans v. Howell, supra, are expressly overruled, and it is held that 'there can be no recovery on a contract against one party whose performance is dependent on some act to be done or foreborne by the other, unless the condition precedent has been fully or substantially performed by the plaintiff, or he has averred and proved a sufficient excuse for the nonperformance.'"

"Under this authority, if appellee desired to rely upon a waiver it was necessary for him to specifically allege it; he did not do so until after the Statute of Limitations had run; the Court improperly sustained the demurrer to the plea of the Statute of Limitations, and on account of that error the judgment will be reversed and the cause remanded."

No change in the pleadings took place after the remandment of said cause. The trial court in compliance with the rulings of this court overruled said demurrer, and appellant having elected to abide his demurrer, judgment was rendered against him in bar of action and for costs.

The holding of this court on the former trial is now the law of the case. Ogle v. Turpin, 8 App. 453; Union Insurance Co. v. Kirchoff 51 App. 61; Newberry v. Blatcher, 116 Ill. 584; Union Natl Bank of Chicago v. Port, 93 App. 339-345.

with anyone) . called out to arrest and to his 14

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U.S. DEPARTMENT OF JUSTICE

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1. *What is the purpose of this document?*

1. The first group of variables includes the demographic characteristics of the respondents, such as age, gender, and education level. These variables are used to control for potential confounding factors that may influence the relationship between the independent and dependent variables.

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U.S. DEPARTMENT OF AGRICULTURE

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-The above are just some examples of the many ways in which the

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THE DEPARTMENT OF THE ARMY, WASHINGTON, D. C. 20315

"...between some and all."

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The trial court in compliance with the findings of fact and the law of the case.

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The holding of this court on the former bill is now the law.

U.S. GOVERNMENT PRINTING OFFICE: 1967

10-10-1964

A reviewing court is bound to recognize its former holding upon the questions involved as res judicata on a subsequent appeal, and the consequent obligation upon the trial court to follow such holding. C. C. C. & St. L. Ry Co. v. Alfred, 123 App. 477-481, citing: Wilson v. Carlinville National Bank, 87 App. 364; Chicago & A. R. R. Co. v. Kelly, 182 Ill. 267.

It is a well settled rule that when a cause is litigated and that litigation prosecuted to a court of appeals and passed upon, all questions that were open to reconsideration and could have been presented, relating to the same subject matter, are res judicata, whether they were presented or not. Lusk v. City of Chicago, 211 Ill. 183-188; Village of Oak Park v. Swigart, 266 Ill. 60-61.

The law further is that if the finding of a reviewing court is not challenged by a petition for a rehearing, that finding cannot thereafter be questioned, except on certiorari. Windette v. Nichols, 151 Ill 184-190; Village of Oak Park v. Swigart, supra; Wolkau v. Wolkau, 299 Ill. 176-181; Owen v. Aetna Iron Works, 76 App. 325-328. In Windette v. Nichols, supra, the court at page 190 says:

"The only mode in which modifications of the final judgments of this court can be obtained is by a petition for a rehearing, and if a party has failed to avail himself of that mode, or has resorted to it unsuccessfully, his remedy is at an end. He cannot be permitted, after the cause has been remanded for further proceedings in conformity with the opinion and judgment of this court, to secure in the court below or on a second appeal to this court that which he failed to obtain by his petition for a rehearing."

The points sought to be raised by plaintiff on this writ of error were before this court on the former appeal, were passed upon and adjudicated adversely to plaintiff's contentions. Under the authorities above cited, we would not be warranted, if we so desired, in holding differently than we did on the former appeal. We are, however, satis-

A reviewing court is bound to recognize the former holding

upon the question involved as was indicated on a subsequent appeal, and

the reviewing court is bound to follow the former holding.

100-100; Williams v. Jones, 100-100, 100-100, 100-100, 100-100.

100-100; Williams v. Jones, 100-100, 100-100, 100-100, 100-100.

100-100; Williams v. Jones, 100-100, 100-100, 100-100, 100-100.

It is a well settled rule that when a case is affirmed and

the litigation presented to a court of appeals and passed upon, all

questions that were open to reconsideration and could have been pre-

sented, submitted to the court and passed upon, are conclusively

settled. 100-100; Williams v. Jones, 100-100, 100-100, 100-100, 100-100.

100-100; Williams v. Jones, 100-100, 100-100, 100-100, 100-100.

The law further is that if the finding of a reviewing court is

not changed by a petition for a rehearing, that finding cannot there-

after be questioned. 100-100; Williams v. Jones, 100-100, 100-100, 100-100.

100-100; Williams v. Jones, 100-100, 100-100, 100-100, 100-100.

100-100; Williams v. Jones, 100-100, 100-100, 100-100, 100-100.

100-100; Williams v. Jones, 100-100, 100-100, 100-100, 100-100.

"The only more in which modifications of the final judgments

of this court can be obtained is by a petition for a rehearing, and if

a party has failed to apply for such relief, he has exhausted his

remedy. His remedy is at an end. He cannot be permitted, after

the cause has been remanded for further proceedings in conformity with

the opinion and judgment of this court, to return to the court with an

on a second appeal to this court that which he failed to object to in

the first appeal.

The points sought to be raised by plaintiff on this writ of

error were before this court on the former appeal, were passed upon and

affirmed adversely to plaintiff's contention. Under the authorities

above cited, we would not be warranted, if we so desired, in holding

otherwise than we did on the former appeal. We are, however, satis-

fied with our former holding and with the law as therein set forth.

For the reasons above set forth, the judgment of the trial court will be affirmed.

Judgement affirmed.

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• Novelties on the scene

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the _____

_____ of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hercunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court



W. H. Jones
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of May, in
the year of our Lord one thousand nine hundred and twenty-eight,
within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. FRANKLIN H. BOGGS, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

249 I.A. 656⁴

BE IT REMEMBERED, that afterwards, to-wit: On

JUL 12 1928 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

In The
APPELLATE COURT OF ILLINOIS
Second District

February Term, A.D., 1928

HARRY WEIDEN,
Plaintiff in Error,

vs.

WORTH BRITISH AND MERCANTILE
INSURANCE COMPANY, a corporation,
Defendant in Error.

Writ of Error to
the Circuit Court
of Woodford County.

OPINION by ROGGS, J.

Plaintiff in error, hereinafter referred to as plaintiff, brought suit in the Circuit Court of Woodford County against defendant in error, referred to as defendant, upon a policy of fire insurance issued by defendant to plaintiff in the sum of \$600, on a dwelling house in Eureka, in said county, said house having been totally destroyed by fire.

Upon a trial before the Court, a jury having been waived, a finding and judgment was rendered in favor of plaintiff for the full amount of said policy. From that judgment, defendant prosecuted an appeal. At the April Term, 1925, of this court, said judgment was reversed and the cause was remanded with instructions to overrule a demurrer filed by the plaintiff to certain special pleas. Upon the remanding order being filed, the trial court overruled said demurrer; the plaintiff elected to abide his demurrer, and judgment was rendered against him in bar of action and for costs. To reverse said judgment,

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The first of these is the fact that the
 Government has been unable to obtain
 the necessary information from the
 various sources which it has been
 accustomed to rely upon. This is
 due to the fact that the Government
 has been unable to obtain the
 necessary information from the
 various sources which it has been
 accustomed to rely upon.

Upon a trial before the Court, a jury having been sworn, the finding and judgment was rendered in favor of plaintiff for the full amount of said policy. From that judgment defendant appealed to the Supreme Court, and the Supreme Court, by a majority of five to four, affirmed the judgment of the trial court. The Supreme Court, in its opinion, stated that the contract was a contract of insurance, and that the plaintiff was entitled to recover the full amount of the policy.

plaintiff prosecuter this writ of error.

The pleadings are identical with those in Leiden v. Commercial Union Assurance Company, general no. 7834, decided by us at this term, other than that the two cases are against different defendants. Our opinion in the other case is controlling in this case. The judgment of the trial court must therefore be affirmed.

Judgment affirmed.

January 1900

The following are the names of the persons who have been elected to the office of Justice of the Peace for the year 1900, and who have taken the oath of office and qualification on the 1st day of January, 1900.

Justice of the Peace

John A. Smith

1900

John A. Smith, Justice of the Peace for the year 1900.

John A. Smith

John A. Smith, Justice of the Peace for the year 1900.

John A. Smith, Justice of the Peace for the year 1900.

John A. Smith, Justice of the Peace for the year 1900.

John A. Smith, Justice of the Peace for the year 1900.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in

and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the _____

_____ of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty- _____

Clerk of the Appellate Court

Abstract

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of May, in
the year of our Lord one thousand nine hundred and twenty-eight,
within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. FRANKLIN H. BOGGS, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

249 I.A. 656⁵

BE IT REMEMBERED, that afterwards, to-wit: On
JUL 12 1928 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:



In The
APPELLATE COURT OF ILLINOIS.
Second District

May Term, A.D., 1928

| | | |
|---------------|---|---|
| T. C. SMITH, | } | Appeal from the
Circuit Court of
Livingston County. |
| Appellee, | | |
| v. | | |
| FRED DUCKETT, | | |
| Appellant. | } | |

OPINION by BOGGS, J.

On May 28, 1927, at about 7:45 P. M., Mabel Smith Grover, a daughter of appellee, with her aunt, a Mrs. Tate, was driving in an easterly direction from Pontiac to Fairbury, on state highway Number 8. At a point some half-mile east of Fairbury, their automobile approached a team and wagon, going in a westerly direction. Appellant was also driving in a westerly direction and as he turned out to pass said team and wagon, his automobile skidded, the rear end struck said wagon, and his car collided with the car driven by appellee's daughter. To recover damages therefor, appellee instituted suit in the Circuit Court of Livingston County.

The declaration, consisting of one count, avers that appellee's daughter, with his consent, was driving the automobile in question on route 8 as above stated, and was in the exercise of due care for the safety of said automobile, and that through the negligent operation of the automobile driven by appellant, said collision occurred alleging damages, etc. A plea of the general issue was filed, and a

In The

Supreme Court of the State of Texas
At Dallas, Texas

May Term, A.D., 1928

Appeal from the
District Court of
Livingston County, Texas.

W. T. KIRBY,
Appellant,
vs.
J. W. KIRBY,
Respondent.

OPINION BY ROBERT S.

On May 28, 1927, at about 7:45 P. M., Mabel Smith Grover, a daughter of appellee, with her aunt, a Mrs. Tate, was driving in an easterly direction from Pontiac to Kirby, on state highway number 2. At a point some half-mile east of Kirby, their automobile approached a team and wagon, going in a westerly direction. Appellant was also driving in a westerly direction and as he turned out to pass said team and wagon, his automobile skidded, the rear end struck said wagon, and his car collided with the car driven by appellee's daughter. To recover damages therefor, appellee instituted suit in the District Court of Livingston County.

The declaration, consisting of one count, avers that appellee's daughter, with his consent, was driving the automobile in question on Route 2 as above stated, and was in the exercise of due care for the safety of said automobile, and that through the negligent operation of the automobile driven by appellant, said collision occurred, resulting in the death of said daughter, and a

trial was had, resulting in a verdict and judgment in favor of appellee for the sum of \$730. To reverse said judgment, this appeal is prosecuted.

Appellant testified that he "was driving with dimmers on. There was a slight mist falling. Not enough to obstruct the view from the windshield. Just enough to make the pavement slippery. It was dark. The farthest that I could see plainly was about 50 feet ahead. Just before the accident occurred, I noticed the car (appellee's) approaching from the west, about 1,000 feet away at first. I was traveling around 30 miles per hour. I was going west. * * * My car was to the right of the center line of the highway. The other car was approaching from the west. It was on the right side of the black line. I first saw the wagon. I immediately applied the brakes. As I applied the brakes, the car skidded and the next instant I hit the back end of the wagon. * * * After I hit the wagon, the next instant I was on the south side of the road. I was no more on the south side of the road that the head-on collision took place with the car coming from the opposite direction."

Appellee's daughter, testified: "I could see the other car coming by his lights, about two blocks away. I saw a wagon between his car and my car. It was going west on the right side of the black mark. Do not know whether it was on the pavement or not. The front end of my car was even with the back end of the wagon when the collision occurred. I could see this car coming and I could see the wagon, because it was not clear dark. It happened so quick, just a crash."

It is first contended for a reversal of said cause that the court erred in its rulings on the evidence. Appellee's daughter testified that after the collision, appellant immediately came over to the car in which she and her aunt were, and wanted to know if anyone was hurt. She was then asked by counsel for appellee:

"Q. Was there anything further said there that evening by him?" She answered: "He rushed over to my car and said, 'I didn't see that wagon,' he says, 'I guess it was my fault, I put on my brakes

trial was had, resulting in a verdict and judgment in favor of the appellee for the sum of \$750. To reverse said judgment, this appeal is presented.

Appellant testified that he was driving with his car on the highway at a slight mist falling. Not enough to obstruct the view from the windshield. Just enough to make the pavement slippery. It was the farthest that I could see plainly was about 50 feet ahead.

Just before the accident occurred, I noticed the car (appellee's) approaching from the west, about 1,000 feet away at first. I was traveling around 30 miles per hour. I was going west. I was on the right of the center line of the highway. The other car was approaching from the west. It was on the right side of the black line. I immediately applied the brakes. As I applied the brakes, the car skidded and the next instant I hit the back end of the wagon. * * * After I hit the wagon, the next instant I was on the south side of the road. I was no more on the south side of the road than the head-on collision took place with the car coming from the opposite direction.

Appellee's daughter, testified: "I could see the other car coming from the west, about two blocks away. I saw a wagon between the car and the west. It was going west on the right side of the black line. I do not know whether it was on the pavement or not. The front of my car was even with the back end of the wagon when the collision occurred. I could see this car coming and I could see the wagon, but it was not clear dark. It happened so quick, just a moment."

It is first contended for a reversal of said cause that the appellee erred in its rulings on the evidence. Appellee's daughter testified that after the collision, appellant immediately came over to the car in which she and her aunt were, and wanted to know if anyone was hurt. She was then asked by counsel for appellee:

"Q. Was there anything further said there that evening by the appellee?" He answered: "He rushed over to my car and said, 'I didn't see the wagon,' he says, 'I mean it was my fault, I put on my brakes

but I just couldn't help it.' I said I was so worried about the car, because it was my father's car. He said, 'Just don't worry about that, I will take care of the damages, I am covered by insurance, the great thing is if anybody is hurt.'"

On motion of counsel for appellant, the court struck that part of the answer referring to insurance. Counsel for appellant moved the court to withdraw a juror, etc., which motion was denied by the court, with the statement: "There is no proof before the Court that counsel knew what the answer would contain." On cross examination, appellee's daughter testified: "I told Mr. Thompson before this trial what I told on the witness stand, and all I told on the witness stand, as to what Mr. Duckett said. That was before I went on the stand." Counsel for appellant renewed his motion to withdraw a juror, but the motion was denied and the court stated to the jury that he reversed his ruling and would "submit that entire conversation to you, not for the purpose of showing that the defendant was insured, that being incompetent, but only for the purpose of throwing whatever light it may be on the question of the probability of whether the defendant did make the statement testified to at that time, and for that purpose and for that purpose only is it permitted to remain in the record for your consideration."

Mrs. Tate testified, over the objection of appellant, that Mrs. Grover, appellee's daughter, said in the presence of appellant: "What will papa say?" He (appellant) said, 'I am to blame and I am insured and I will fix up your car,' something to that effect." One Perry J. Keck, a witness for appellee, testified: "I was talking with Mrs. Grover (appellee's daughter) in regard to anybody being injured. He (appellant) came toward us, saying that he was fully covered by insurance the damage would be paid, and that it was all his fault." A motion to strike said answer with reference to said insurance was denied. Appellee testified over objection that he had a conversation with appellant the day following the accident, and that appellant

... I said I was so worried about the case, ...
... He said, 'Just don't worry about it, ...'
... I am covered by insurance, ...

On motion of counsel for appellant, the court ...
... On motion of counsel for appellant, the court ...
... which motion was denied by the ...
... The statement: "There is no proof before the court ..."
... On cross examination, ...
... I told Mr. Thompson before this trial ...
... and all I told on the witness stand, ...
... at Mr. Thacker's trial. What was before I went on the stand."

... denied and the court stated to the jury that he ...
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... the question of the probability of whether the statement ...
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... is it permitted to remain in the record for ...

Mrs. White testified, over the objection of appellant, that ...
... in the presence of appellant: ...
... He (appellant) said, 'I am so glad and I ...'
... I will fix up your car,' something to that effect. ...
... I was called: "I was called: ..."
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... and that it was all his fault. ...
... with reference to said statement was ...
... that he had a conversation ...
... the day following the accident, and that appellant

stated "He was to blame for it. He said he was fully covered, and that I would be settled with." Appellant in his testimony denied ever having made any of the statements with reference to being insured, etc., testified to by the witnesses for appellee.

Under the repeated decisions of the supreme and appellate courts of this state, the ruling of the court on the testimony with reference to appellant's statement that he was covered by insurance, was clearly erroneous. McCarty v. Spring Valley Coal Co., 232 Ill. 473-480; Maithen v. Jeffery, 259 Ill. 372-375; Bishop v. Chicago Junction Ry Co., 289 Ill. 33-67; Fuller Co. v. Darragh, 101 App. 664-667; Wallner v. Smith-Lohr Coal Co., 145 App. 486-490; Terry v. Livingston C. M. C. Co., 156 App. 60-64. In Bishop v. Chicago Junction Ry Co., supra, the court at page 67 says:

"Any statement which shows that the defendant in a lawsuit is being protected from the payment of damages by being reimbursed for such payment is error, and the superior court erred in not instructing the jury to disregard the statement."

It might also be observed, that the purported statements of appellant, that the accident was his fault and that he was to blame, were conclusions and not statements of fact. The fact that the court stated to the jury the purpose for which the testimony was admitted did not cure the error. There being no question made that counsel for appellee did not know what Mrs. Grover's testimony with reference to appellant's statement would be, there was no reason why counsel could not have limited said testimony so as to have excluded any reference to appellant being insured.

It is also insisted that the court erred in striking from the record the testimony of appellant that "the force of hitting the wagon sent me over on the south side of the road." The court did not err in so striking said answer, as it was a conclusion on the part of appellant.

It is next insisted that the court erred in giving the first second, third, fourth, fifth and sixth instructions given on behalf of appellee. The complaint made as to the first instruction is not well

... He was to blame for it. It could be said that the jury was misled, and that it would be settled with "Appellant in his testimony denied

ever having made any of the statements with reference to being insured, etc., testified to by the witnesses for appellee.

Under the repeated decisions of the supreme and appellate

courts of this state, the ruling of the court on the testimony with reference to appellant's statement that he was covered by insurance, was clearly erroneous. McGarity v. Burlington Valley Coal Co., 232 Ill.

413-414; Waters v. Lattery, 233 Ill. 478-479; Waters v. Lattery

Insurance Co. of N. Y., 234 Ill. 47-48; Waters v. Lattery, 234 Ill. 47-48.

Waters v. Lattery, 234 Ill. 47-48; Waters v. Lattery, 234 Ill. 47-48; Waters v. Lattery, 234 Ill. 47-48; Waters v. Lattery, 234 Ill. 47-48.

... the court at page 37 says:

"Any statement which shows that the defendant is a law-abiding

citizen protected from the payment of damages by being reimbursed for such damages is error, and the superior court acted in not instructing the jury to disregard the statement."

It might also be observed, that the purported statements of

appellant, that the accident was his fault and that he was to blame,

were conclusions and not statements of fact. The fact that the court

acted to the jury the purpose for which the testimony was admitted did

not cure the error. There being no question made that counsel for

appellee did not know what Mrs. Grover's testimony with reference to

appellant's statement would be, there was no reason why counsel could

not have limited said testimony so as to have excluded any reference to

appellant's fault.

It is also insisted that the court acted in striking from

the record the testimony of appellant that "the fence of his place was upon

land we own on the north side of the road." The court did not act in

striking said answer, as it was a speculation on the part of appellant.

It is next insisted that the court acted in giving the first

verdict, third, fourth, fifth and sixth instructions given on behalf of

appellee. The complaint made as to the first instruction is not well

taken. The complaint as to the second instruction is that it does not require that the driver of appellee's automobile be in the exercise of due care for the safety of the same, just prior to and at the time of the collision, and that the effect of the instruction was to eliminate the matter of due care, while appellee's daughter was driving on the right side of the slab on said highway. We do not think that the latter objection is well taken, but the instruction should have been so drawn as to require the jury to find that appellee's daughter was in the exercise of due care and caution just prior to and at the time of said collision.

Appellee's third instruction erroneously refers the jury to the declaration for the charge of negligence against appellant, and the statement with reference to what would constitute the proximate cause of the collision is not properly guarded.

The fourth instruction is also erroneous in referring the jury to the declaration for the charge of negligence.

The fifth instruction undertakes to inform the jury as to why the statement of appellant with reference to being insured was admitted in evidence. It was not error to give this instruction, but we hold that the giving of the same did not cure the error in admitting said evidence.

The sixth instruction is as follows:

"You are further instructed that if you believe, from the evidence, that the plaintiff is entitled to recover under the facts in this case, and the instructions of the Court, and if you further believe, from a preponderance of the evidence, that the plaintiff's car can be repaired, then the measure of the damages is the reasonable cost of said repairs, as shown by the evidence.

The car in question was not repaired. It is the contention of counsel for appellant that the estimated cost of the repairing of said car, as testified to by the witness J. L. Purdum, who testified on behalf of appellee, was not the proper measure of damages, for the reason that the car in question, prior to the time of said collision,

The complaint as to the second instruction is that it does not require that the driver of appellee's automobile be in the exercise of due care for the safety of the same, that prior to and at the time of collision, and that the effect of the instruction was to eliminate the matter of due care, while appellee's counsel was driving on the right side of the road on said highway. We do not think that the latter objection is well taken, but the instruction should have been so stated as to require the jury to find that appellee's negligence was in the exercise of due care and caution that prior to and at the time of collision.

Appellee's third instruction erroneously states the law as to the question for the charge of negligence against appellant, and the statement with reference to what would constitute the proximate cause of the collision is not properly framed.

The fourth instruction is also erroneous in referring to negligence for the charge of negligence. The fifth instruction undertakes to instruct the jury as to the question of appellant with reference to being insured was admitted in evidence. It was not error to give this instruction, but we think the giving of the same did not cure the error in admitting said evidence.

The sixth instruction is as follows: "You are further instructed that if you believe from the evidence that the plaintiff is entitled to recover under the facts in this case, and the instructions of the Court, and if you further believe, from a preponderance of the evidence, that the plaintiff's car was repaired, then the measure of the damages is the reasonable cost of said repairs, as shown by the evidence."

The car in question was not repaired. It is the contention of appellee that the estimated cost of the repairing of the car, as testified to by the witness J. L. Fordham, who testified that the car in question, prior to the time of said collision, was not the proper measure of damages. For the

was of less value than the estimated cost of such repairs. Appellant offered the testimony of a mechanic who stated that he was familiar with cars of this character and the value thereof, but the court refused to admit said evidence.

In Grossen v. C. & J. E. Ry Co., 158 App. 42, this court in discussing a question of this character, at page 44, says:

"When personal property has been injured by the negligence of another and can be repaired, the proper measure of damages is the cost of the repairs and the value of the loss of the use of it while it is being repaired. FitzSimons v. Braun, 199 Ill. 390; Travis v. Pierson, 43 Ill. App. 579; Berry v. Campbell, 118 Ill. App. 646. If the property could not be repaired then the measure would be the difference between the market value of the property before the injury and the value of the wreckage. Appellee if he was entitled to recover, was entitled to compensatory damages for the injury, but he had no right to speculate at the expense of appellant in repairing the machine and after once repairing it tear it in pieces and rebuild it because of his own mistake, or to make repairs at an expense greater than the value of the machine after it was repaired. He did not have the right to introduce evidence concerning both measures of damages without informing the jury in some way, so they would not be misled, that they could only allow damages by one of the measures, and that measure must be the one which was the least burdensome to appellant."

In McDonald v. L. E. & W. R. Co., 208 App. 442, this court, after citing and discussing a large number of cases, at page 454 says: "As we have shown, each of the appellate courts of this state has held that the cost of the necessary repairs to personal property which has been injured by the negligence of a defendant, which can be restored to its former condition, if less than the value of the property before it was injured, is the true measure of damages."

It therefore follows that on the record in this case said instruction did not correctly submit the question of the damages to the jury.

...of more value than the estimated cost of such repairs. Appellant
...the testimony of a mechanic who stated that he was unable
...this character and the value thereof, but the court was
...to admit such evidence.

1. Green v. E. A. B. Co., 112 Ill. App. 2d 100, 101.

...question of this character, at page 44, says:
"When personal property has been injured by the negligence
of another and can be repaired, the proper measure of damages is the cost
of the repairs and the value of the loss of the use of it while it is
being repaired. Wittig v. Brown, 102 Ill. 2d 600; Travis v. Brown,
113 Ill. App. 2d 679; Berry v. Campbell, 118 Ill. App. 2d 648. If the prop-
erty could not be repaired then the measure would be the difference be-
tween the market value of the property before the injury and the value
of the property. Appellate it was entitled to recover, was entitled
to compensation for the injury, but he had no right to speculate
at the expense of appellant in repairing the machine and after once re-
pairing it was it in pieces and he had to because of his own mistake,
or at least repairing at an expense greater than the value of the machine
after it was repaired. He did not have the right to introduce evidence
concerning both measures of damages without informing the jury in some
way, so they would not be misled, that they could only allow damages by
one of the measures, and that measure must be the one which was the
least burdensome to appellant."

In McDonald v. E. A. B. Co., 208 App. 448, 449, this court,

...citing and discussing a large number of cases, at page 448 says:
"As we have shown, each of the appellate courts of this state has held
that the cost of the necessary repairs to personal property which has
been injured by the negligence of a defendant, which can be restored
to its former condition, is less than the value of the property before
it was injured, in the true measure of damages."

It therefore follows that on the record in this case said
...did not correctly present the question of the damages to

If, under the evidence and the instructions of the court, appellee on a subsequent trial shows a right of recovery, the measure of damages would be the cost of the repair of said automobile, if it can be reasonably repaired, but if the evidence discloses that the cost of the repairs to said automobile will be greater than the value of the car prior to said collision, then the measure of damages would be the difference between the value of the car before said collision and the value of the wreckage thereafter.

Appellee's declaration charges a destruction of his automobile. If he desires to offer proof as to the cost of repairing same he should amend his declaration so as to make such proof proper.

For the reasons above set forth, the judgment of the trial court will be reversed and the cause remanded.

Reversed and remanded.

[illegible]

• February 1st, 1900

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the _____

_____ of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

A Return

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of May, in
the year of our Lord one thousand nine hundred and twenty-eight,
within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. FRANKLIN H. BOGGS, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

249 I.A. 657'

BE IT REMEMBERED, that afterwards, to-wit: On
JUL 12 1928 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

JOHN T. BOSWELL,

Appellee,

vs.

JOHNSTON LUMBER COMPANY,
a Corporation,

Appellant.

APPEAL FROM THE
CITY COURT OF THE
CITY OF KEWANEE.

Jett, J.

This is an appeal by Johnston Lumber Company, incorporated, appellant, from a judgment obtained against it in the City Court in the City of Kewanee by John T. Boswell, appellee, for the sum of \$413. and costs of suit.

This proceeding arises out of the employment by the Johnston Lumber Company of Dr. John T. Boswell to perform medical services for S. D. German an employee of the appellant company who was injured in the course of his employment.

The record discloses that S. D. German had been an employee of the appellant for a number of years prior to October 21, 1925; that on said last date while in the employ of the appellant in loading lumber one of his legs was injured; his leg bothered him for some time and he remained in the employ of the appellant company and continued to discharge his duties and to perform services for it until the 24th day of February, 1926, at which time he became ill and was taken to his home. It is shown by the evidence that when German went to his home his wife called Dr. Boswell, appellee, to attend him. For the first nine visits which appellee made in treating German he made no charge against the appellant company therefor.

S. D. German testified that he was loading lumber on October 21st, 1925, and a plank split and hit him on the leg; that his leg hurt him for a long time and on February following he became sick and went home; that he knew Clarence Paull; that

JOHN T. BOSWELL,

Appellant,

vs.

JOHNSTON LUMBER COMPANY,
a Corporation.

Appellee.

ALIAS FROM THE
CITY COURT OF THE
CITY OF NEWARK,

Left, 1.

This is an appeal by Johnston Lumber Company, in-
 corporate, appellant, from a judgment obtained against it in
 the City Court in the City of Newark by John T. Boswell,
 appellee, for the sum of \$412. and costs of suit.

This proceeding arises out of the employment by the
 Johnston Lumber Company of Dr. John T. Boswell to perform medical
 services for S. D. German an employee of the appellant company
 who was injured in the course of his employment.

The record discloses that S. D. German had been an
 employee of the appellant for a number of years prior to October
 21, 1935; that on said date while in the employ of the
 appellant in loading lumber one of his legs was injured; his leg
 remained in the employ of the
 appellant company and continued to discharge his duties and to
 perform services for it until the 21st day of February, 1936, at
 which time he became ill and was taken to his home. It is shown
 by the evidence that when German went to his home his wife called
 Dr. Boswell, appellee, to attend him. For the first nine visits
 which appellee made in treating German he made no charges against
 the appellant company except:

S. D. German testified that he was loading lumber
 on October 21st, 1935, and a plank split and hit him on the leg;
 that his leg hurt him for a long time and on February following
 he became sick and went home; that he knew Clarence Yell; that

he took orders from Faull; that Faull told him what to do and that Faull paid him.

Appellee testified that he notified Clarence Faull assistant manager of appellant company of the condition of German and that Faull told him to take German to the hospital in an ambulance and to treat him and stated that they would pay the bill. The bill of appellee was \$435. and the jury returned a verdict for the said sum. Since appellee had made no charge against appellant for the first nine visits in treating German he entered a remittitur for \$22.50. Judgment was rendered in favor of appellee and against appellant for \$413.

A number of reasons are assigned by appellant for a reversal of the judgment.

It is first insisted that Clarence Faull was not authorized to employ appellee. The record shows that Thomas H. Johnston was called by appellee as a witness and testified as follows: "I am president and manager of the Johnston Lumber Company. I know Clarence Faull. He has worked for the company for 10 or 12 years. Mr. Faull has no official title. He started in as a book-keeper and as time went on I kind of took a back seat and let him wait on customers. I rather shortened my duties and let him do some of them. When I am not there most of the managerial duties of the company fall on Mr. Faull. I would say that Mr. Faull is acting assistant manager but he has never had any title. I think his duties are as an assistant manager. He makes up the payroll and gives the men their orders to do work. He looks after the running and conduct of certain parts of the business."

Clarence Faull, on the part of the defendant, among other things testified that he worked for the Johnston Lumber Company; that he did not recall any conversation with Dr. Boswell in which Boswell said German was not getting along well, and

as soon as he came from Tulsa; that he told him that he was
that he told him that he was
appellate testified that he notified Clarence Hall
assistant manager of appellant company of the condition of
Tulsa and that he told him to take care of the condition in
an abundance and to treat him and stated that they would pay
the bill. The bill of appellate was \$4.00 and two days returned
a verdict for the said sum. Since appellate had made no charge
against appellant for the first nine visits in treating German
he entered a remittitur for \$2.00. Judgment was rendered in
favor of appellate and against appellant for \$2.00.
A number of reasons are assigned by appellate for a
reversal of the judgment.
It is first insisted that Clarence Hall was not
entitled to employ appellate. The record shows that Thomas W.
Jenkinson was called by appellate as a witness and testified as
follows: "I am president and manager of the Jenkinson Lumber
Company. I know Clarence Hall. He has worked for the company
for 12 or 13 years. Mr. Hall has no official title. He worked
in as a book-keeper and at times went on I kind of book work
and let him wait on customers. I rather enjoyed my duties
and let him do some of them. When I am not home most of the
managerial duties of the company fall on Mr. Hall. I would not
say that Mr. Hall is acting assistant manager but he has never had
any title. I think his duties are as an assistant manager. He
takes up the payroll and gives the men their orders to do work.
He looks after the running and conduct of certain parts of the
business."
Clarence Hall, on the part of the defendant, asked
other witnesses testified that he worked for the Jenkinson Lumber
Company; that he did not recall any conversation with Mr. Jenkinson
in which Jenkinson said German was not getting along well, and

needed to be taken to the hospital; that he did not remember anything about telling Dr. Boswell to take German in an ambulance to the hospital. He further testified that if he had had any such conversation he thought he would remember it; that the first that he knew German was in the hospital was on the Monday after he had been taken there; that he never had any conversation at the hospital about who was to pay for appellee's services.

The evidence as to the employment of Dr. Boswell by the defendant to treat the witness German is conflicting. German was an employee of the appellant and both were under the Workmen's Compensation Act. Boswell testified that he called Faull, who was designated by Johnston the president of appellant, as acting manager, and told him that German should be taken to the hospital in an ambulance and that Faull told him it was all right. From the time German was taken to the hospital he was under the care of Dr. Boswell with full knowledge and consent of the defendant company. No other doctor was offered by the defendant company to the witness German and under the Compensation Act the employer is required to furnish necessary medical attention. Since the testimony is conflicting and the cause having been submitted to a jury and the jury found in favor of appellee the verdict should not be disturbed unless some error at law has intervened in the admission of evidence or in the giving or the refusing of instructions.

Faull was assistant manager of the appellant company and as such exercised the general powers of a manager. The manager of a corporation has a general power to transact any business within the scope of the corporation's business. *Williams vs. Harris*, 198 Ill. 501.

A corporation is bound by the acts of its agent in the exercise of powers within the apparent scope of his authority,

needed to be taken to the hospital; that he did not remember the
date about which Dr. Roswell told him that he was in the hospital
the hospital. He further testified that he was not at the
conviction on account of which he was in the hospital
he was in the hospital was on the morning after he had
been taken there; that he never had any conversation at the
hospital about the case of the defendant's conviction.
The witness as to the employment of Dr. Roswell by
the defendant in the case of the defendant's conviction
was an employee of the defendant and both were under the defendant's
management. Roswell testified that he called Paul, who was
employed by the defendant as a physician, to the
hospital, and told him that German should be taken to the hospital
in an ambulance and that Paul told him it was all right. From
the time German was taken to the hospital he was under the care of
Dr. Roswell with full knowledge and consent of the defendant.
No other doctor was called by the defendant company to
the hospital and under the corporation the physician is
required to furnish necessary medical attention. Since the testimony
is conflicting and the same having been submitted to a jury and
the jury found in favor of appellee the verdict should not be
reversed unless some error at law was introduced in the admission
of evidence or in the giving of the instructions.
Paul was assistant manager of the appellant company
and he was exercised the general powers of a manager. The
company is a corporation has a general power to transact any business
within the scope of the corporation's business. William vs. United
The Ill. 301.
A corporation is bound by the rest of the world in the
exercise of powers within the general scope of its business.

unless special limitations upon his powers are brought to the notice of the party dealing with him. American Hominy Company vs. National Bank of Decatur, 294 Ill. 223-235.

The general rule is that a corporation acts through its president or business head and through him executes its contracts and agreements. The contract pertaining to the business of the corporation within the general powers of such an officer done through him, will in the absence of proof to the contrary be presumed to have been authorized by the corporation. Williams vs Harris , 198 Ill. 504; Atwater vs American Exchange National Bank, 152 Ill. 605; Bank of Minneapolis vs Griffin, 168 Ill. 314.

It is also insisted by appellant that reversible error was committed on account of the fact that appellee in his testimony referred to the insurance company as being liable for his bill. We think this reference should not have been made. However, appellant is in no position to take advantage of it for the reason that Faull, the assistant manager and Johnston the president, in their testimony referred to the matter of insurance liability. Johnston testified that he had a conversation with appellee in the summer of 1926 and stated: "I stopped Doc and spoke to him. What I said to him at that time was, "Doc, did you hear from the insurance company?" He answered, "No". And I said, "They are darned slow ain't they?"

Faull testified: "I had a conversation with Dr. Boswell about his bill. He called me up and wanted to know if the insurance company was going to take care of it. He wanted me to speak to Mr. Johnston about it, and get after the insurance company to see if they wouldn't take care of it".

It is also urged by the appellant that error was committed in the giving of instructions on the part of appellee. It is the contention of appellant that instruction No. 5 given in behalf of

...the general rule is that a corporation acts through its president or business head and through him executes its contracts and agreements. The contract pertaining to the business of the corporation within the general powers of such an officer done through him, will in the absence of proof to the contrary be presumed to have been authorized by the corporation. Williams vs. ... 100 Ill. 604; ... vs. Griffin, 100 Ill. 605; ... vs. ... 100 Ill. 606.

It is also insisted by appellant that reversible error was committed on account of the fact that appellee in his testimony referred to the insurance company as being liable for ... We think this reference should not have been made. However, appellant is in no position to take advantage of it for the reason that Tauli, the assistant manager and Johnston the president, in their testimony referred to the matter of insurance liability. Johnston testified that he had a conversation with appellee in the summer of 1936 and stated: "I stopped Doc and spoke to him. What I said to him at that time was, 'Doc, did you hear from the insurance company?' He answered, 'No.' And I said, 'They are damned slow ain't they?'"

Tauli testified: "I had a conversation with Mr. ... about his bill. He called me up and wanted to know if the insurance company was going to take care of it. He wanted me to speak to Mr. Johnston about it, but the whole time Johnston was trying to see if they wouldn't take care of it." It is also urged by the appellant that error was committed in the giving of instructions on the part of appellee. It is the contention of appellant that instruction No. 2 given in behalf of

appellee is erroneous for the reason that the instruction did not state that the burden was upon the plaintiff to prove the contract of employment by a preponderance of the evidence. Appellee's instruction No. 2 stated that the burden of proof was upon him. The first instruction given on the part of appellant informed the jury that the plaintiff was required by law to establish his case by a preponderance of the evidence before he could recover. Considering all of the instructions together we do not think it was reversible error because some of the instructions did not state that it was incumbent upon the plaintiff to make out his case by a preponderance of the evidence. The jury understood from the instructions that before a verdict could be had in favor of the plaintiff that he must make out his case by a preponderance or greater weight of the testimony.

Criticism has been made of other instructions given on the part of appellee but we are of the opinion that notwithstanding the criticism no reversible error was committed in the giving or the refusing of instructions.

It is not disputed that the services were performed. The principal controversy was as to whether or not the doctor had been employed by the appellant company. That was a question of fact for the jury and after a careful examination of the testimony, while there is some conflict in the evidence, we are of the opinion that the jury was authorized to find as it did in favor of appellee.

Observing no reversible error in the instructions nor in the admissibility of evidence the judgment of the City Court of the City of Kewanee will be affirmed.

Judgment affirmed.

appeals is determined by the facts and circumstances of the case. It is not the duty of the appellate court to re-examine the evidence or to weigh the evidence. The appellate court is to determine whether the trial court's decision is supported by the evidence. If the evidence is such that a reasonable jury could find in favor of the plaintiff, the trial court's decision is affirmed. If the evidence is such that a reasonable jury could find in favor of the defendant, the trial court's decision is reversed. If the evidence is such that a reasonable jury could find in favor of either party, the trial court's decision is affirmed. If the evidence is such that a reasonable jury could find in favor of neither party, the trial court's decision is reversed. If the evidence is such that a reasonable jury could find in favor of the plaintiff, the trial court's decision is affirmed. If the evidence is such that a reasonable jury could find in favor of the defendant, the trial court's decision is reversed. If the evidence is such that a reasonable jury could find in favor of either party, the trial court's decision is affirmed. If the evidence is such that a reasonable jury could find in favor of neither party, the trial court's decision is reversed.

Criticism has been made of other instructions given on the part of appellee but we are of the opinion that notwithstanding the criticism no reversible error was committed in the giving of the instruction.

It is not disputed that the services were performed. The principal controversy was as to whether or not the doctor had been employed by the appellant company. That was a question of fact. The jury and after a careful examination of the testimony, while there is some conflict in the evidence, we are of the opinion that the jury was authorized to find as it did in favor of appellee.

Nothing no reversible error in the instructions was in the admissibility of evidence the judgment of the City Court of the City of Lawrence will be affirmed. Judgment affirmed.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

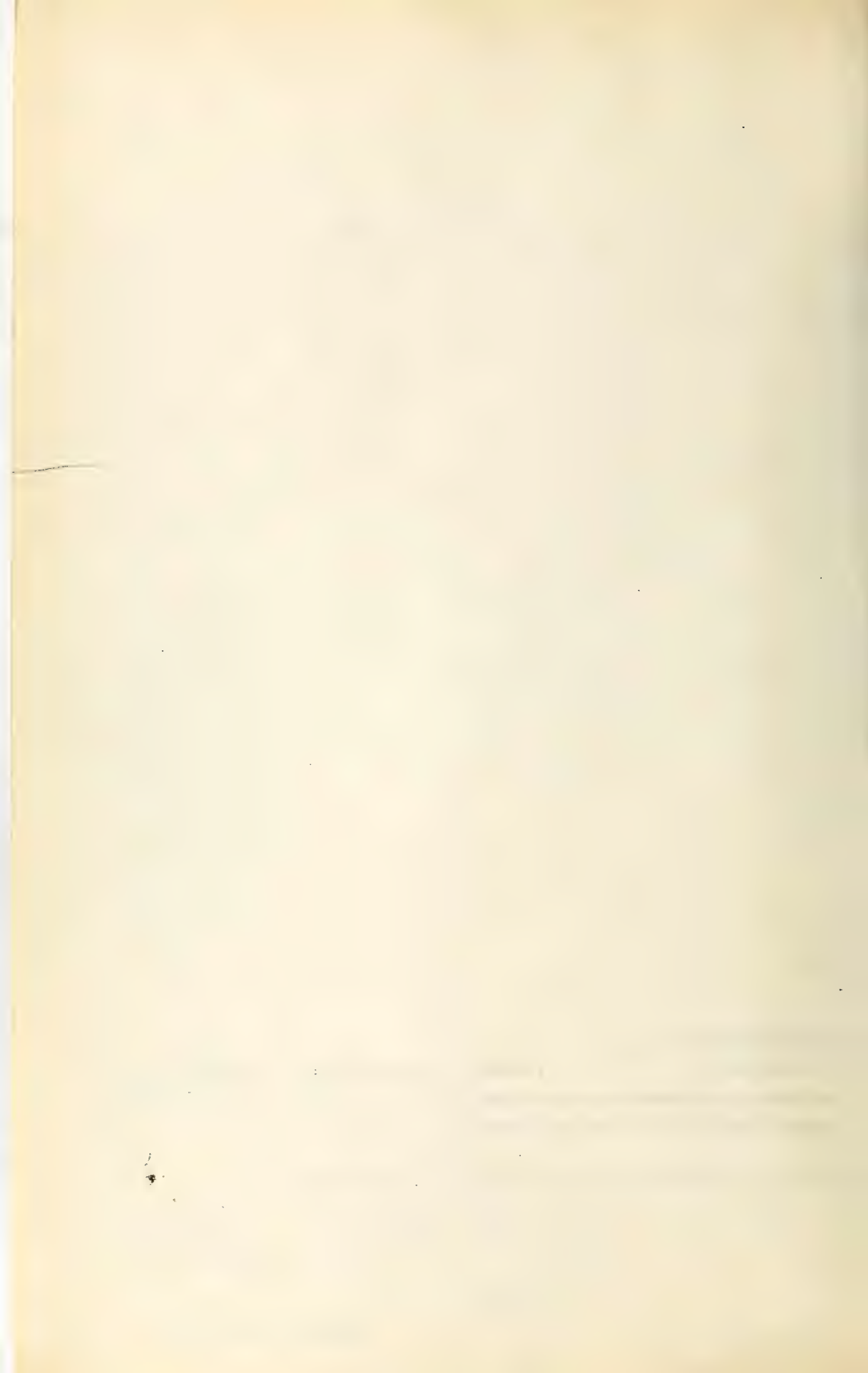
I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in

and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the _____

_____ of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court



abstract

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of May, in
the year of our Lord one thousand nine hundred and twenty-eight,
within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. FRANKLIN H. BOGGS, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

249 I.A. 657²

BE IT REMEMBERED, that afterwards, to-wit: On
JUL 24 1928 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

IN THE
APPELLATE COURT OF ILLINOIS.

May Term, A.D. 1936.

Appeal from the
Circuit Court of
Peoria County.

THE PEORIA COUNTY INSURANCE
COMPANY OF NEW YORK, a Corporation,
Appellant.

OPINION BY JUDGE, J.

An action on the case was instituted by appellee against
appellant in the circuit court of Peoria County to recover on a
policy of insurance for \$5,000.00 insuring John Edward Scholcher
against "liability or death resulting directly or indirectly
and exclusively of any and all other causes, from bodily injury
sustained solely through accidental means." The complaint was
in the usual form, to which was filed a plea of the general issue.
A trial was had, resulting in a verdict and judgment in favor
of appellee in the sum of \$5,000.00. To reverse said judgment,
this appeal is presented.

At a former term of this court, we had before us on writ
of error a writ brought by appellee against the General Accident,
Fire and Life Insurance Corporation, on an accident policy of
similar character. The opinion in that case is reported in

240 App. 247. The facts here are practically the same as in that case, and are as follows:

John Edward Schleicher, of the city of Peoria, died October 21, 1923, from the effects of a weakened heart. Prior thereto, on July 12, 1923, he had a tooth extracted, and, as a part of said operation, nitrous oxide gas was administered. Shortly thereafter, Schleicher developed a nausea, vomited, and had to be taken home in an automobile. He gradually grew worse, and died on October 21, as above stated.

No complaint is made of the rulings of the court on the instructions. In fact, the instructions are not abstracted. It is first contended by appellant that the assured's death did not result from accidental means, as contemplated by the terms of said policy. In *Schleicher v. General Accident, Fire and Life Assurance Corporation*, supra, practically the same grounds were urged as to why the assured's death was not accidental as are urged here. At page 251, we said:

"Plaintiff in error contends that, according to the facts shown by the record, the decedent did not come to his death as a result of accidental means, basing such contention upon the position that the decedent, in taking the gas and having the tooth extracted, was doing just what he was intending to do, and that where one does an act in the manner intended, with a result which was not intended, the result does not ensue from 'accidental means.' Notwithstanding what some of the other courts have said concerning cases involving the same question, we are of the opinion the courts of Illinois are committed to the rule announced in 4 Cooley's Briefs on Insurance 3156: 'An effect which is not the natural or probable consequence of the means which produced it, an effect which does not ordinarily follow and cannot be reasonably anticipated from the use of such means, an

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and died on October 21, as above stated. He gradually grew worse, and to be taken home in an automobile. He gradually grew worse, and nearly thereafter, Schlachter developed a nervous, vomiting, and died in said operation, without either the usual forces.

No complaint is made of the ruling of the court on the

as to why the assumed death was not accidental in the
Assurance Corporation; again, practically the same answers were
said policy. In Schleicher v. General Accident, Fire and Life
result from accidental means, as contemplated by the terms of

... and here. At page 251, we said:

that there was no act in the manner intended, with a result
being intended, was being just what he was intending to do, and
position that the decedent, in taking the gas and having the
a result of accidental means, being such contention upon the
view of the record, the decedent did not come to his death as
"PILGRIM" in 1904, and the result was not intended, the result

means. 'Kerwinstandig' what some of the other courts have said concerning cases involving the same question, we are of the opinion - the court of Illinois are unanimous in so ruling themselves in & Cooley's Briefs on Insurance also. An abstract of it is not the subject of protest anywhere at all unless it is stated which does not appear in the report.

It cannot be reasonably anticipated from the case of A. D. Smith, Jr.

effect which the actor did not intend to produce and which he cannot be charged with the design of producing, is produced by "accidental means."

"This rule is sanctioned in Fidelity & Casualty Co. of New York v. Morrison, 129 Ill. App. 260; and in Rowden v. Travelers Protective Ass'n of America, 201 Ill. App. 206. It seems to have been applied in Higgins v. Midland Casualty Co., 221 Ill. 431. The evidence in this case shows that death from the administration of nitrous oxide gas is not the usual and probable result; that it is a very rare occurrence; and that the percentage is as low as 1 to 200,000. The death here involved was produced through 'accidental means' as that term is construed by the courts of this State."

Counsel for appellant criticize the holding of this court in the above-mentioned case. However, the petition for a writ of certiorari was denied by the supreme court, making that decision final.

Counsel for appellant insists that where a person submits to an operation, he must know that he may die, however carefully and skilfully the work is done; that if he dies, it is something that is only the natural sequence of what he voluntarily submitted to and paid to have done, and that therefore, if death follows, it is not accidental.

In Matthiessen & Hegeler Zinc Co. v. Industrial Board, 284 Ill. 378, the court at page 382 says:

"The word 'accident' is not a technical, legal term with a clearly defined meaning, and no legal definition has ever been given which has been found both exact and comprehensive as applied to all circumstances. Different definitions are given, with a very full citation of cases, in 1 Corpus Juris, 390. Anything that happens without design is commonly called an accident, and at least in the popular acceptance of the word any event which is unforeseen and not expected by the person to whom it happens is included in the term."

...not be charged with the design of producing a product which the actor did not intend to produce and which he

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On the above-mentioned case, however, the petition for a writ of habeas corpus was denied by the Supreme Court, and the writ of habeas corpus was denied by the Supreme Court, and the writ of habeas corpus was denied by the Supreme Court.

and paid to have done, and that therefore, it needs follow, it is only the natural sequence of what he voluntarily admitted as being the work in done; that if he lies, it is something to be expected, he must know that he may die, however carefully Counsel for appellant insists that where a person admits

111-278, the report of the FBI on the investigation of the activities of the Communist Party, U.S.A., in the United States, dated 11-1-50, and the report of the FBI on the investigation of the activities of the Communist Party, U.S.A., in the United States, dated 11-1-50.

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To the same effect is City of Joliet v. Industrial Com., 291 Ill. 555-558. In Christ v. Pacific Mutual Life Ins. Co., 312 Ill. 525, the court at page 539 says:

"We have had occasion in a number of cases to define the term 'accident' as used in accident insurance policies. In Hutton v. States Accident Ins. Co., 267 Ill. 267, we said that an effect which is the natural and probable consequence of an act or course of action cannot be said to be produced by accidental means. After citing several cases the rule announced in Prudential Casualty Co. v. Curry, 10 Ala. App. 642, was approved, that 'an accident may be said to be an unforeseen or unexpected event of which the party's own misconduct is not the natural and proximate cause, and hence the result ordinarily and naturally flowing from the conduct of the party insured cannot be said to be accidental even when he may not have foreseen the consequences. * * * The happening of an event, to be properly termed an accident, must not only be unforeseen but without the design and aid of the person.'

"In United States Mutual Accident Ass'n v. Barry, 131 U. S. 100, the complaint charged that the insured jumped from a platform four or five feet high to the ground, and in alighting unexpectedly received an accidental jar and sudden wrenching of his body which caused a stricture of the duodenum, from the effects of which he died a few days later. It was urged that there was no evidence to support the verdict because no accident was shown. The court did not concur in that view, but said: 'The two companions of the deceased jumped from the same platform at the same time and place and alighted safely. It must be presumed not only that the deceased intended to alight safely but thought that he would. The jury were, on all the evidence, at liberty to say that it was an accident that he did not. The court properly instructed them that the jumping off the platform was the means by which the injury, if any was sustained, was caused; that

1. Christ v. Pacific National Life Ins. Co., 112 F.2d 1001, 31-1 USTC ¶10,000, 13-1 AFTR2d 31-1001 (CA-9, 1941).

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On 7. 1941, in Ala. App. 343, was approved, that an accident

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the question was whether there was anything accidental, unforeseen, involuntary, unexpected, in the act of jumping, from the time the deceased left the platform until he alighted on the ground; that the term "accidental" was used in the policy in its ordinary, popular sense, as meaning "happening by chance; unexpectedly taking place; not according to the usual course of things; or not as expected;" that if a result is such as follows from ordinary means voluntarily employed, in a not unusual or unexpected way, it cannot be called a result effected by accidental means; but that if, in the act which precedes the injury, something unforeseen, unexpected, unusual occurs which produces the injury, then the injury has resulted through accidental means.'

"The Barry case is a leading case, which is usually cited in cases on accident policies involving the question of what constitutes an accident. The language quoted was approved in Higgins v. Midland Casualty Co., 281 Ill. 421, which quoted from Bryant v. Continental Casualty Co., 107 Tex. 582, as follows: 'The proper and true test in all instances of voluntary action is that defined in the Barry case. If in the act which precedes the injury, though an intentional act, something unforeseen, unexpected and unusual occurs which produces the injury, it is accidentally caused.' In the Higgins case it was held that sun-stroke was a bodily injury sustained solely through accidental means within the meaning of the policy. It was held to be an accident under the workmen's Compensation act in City of Joliet v. Industrial Com., 291 Ill. 555. Anthrax, though a disease, is an accident under the Workmen's Compensation act if accidentally contracted in the course of the employment. (Chicago Ravine Manf. Co. v. Industrial Com., 291 Ill. 616; McCauley v. Imperial Woolen Co., 261 Pa. St. 312; Turvey v. Brinton, A. C. (1905) 230.) So is arsenical poisoning. (Matthiessen & Hegeler Zinc Co. v. Industrial Board, 284 Ill. 378.) In Stedman v. United States

Industrial Board, 234 Ill. 378.) In Steele v. United States (1952), 340 U.S. 339, the Supreme Court held that the National Labor Relations Board's order requiring the employer to bargain with the union was not an unconstitutional taking of property. The Court stated that the Board's order was a valid exercise of its power to enforce the National Labor Relations Act, and that the employer's obligation to bargain was a part of its duty to the public. The Court also noted that the Board's order was not a taking of property because it did not deprive the employer of any specific property interest.

Mutual Accident Ass'n, 123 N. Y. 307, however, death resulting from anthrax caused by contact with putrid animal matter containing anthrax bacilli was held not to be accidental within the meaning of a policy insuring against death from external, violent and accidental means. The taking of poison; (Healy v. Mutual Accident Ass'n, 133 Ill. 536; Travelers' Ins. Co. v. Dunlap, 160 id. 642; Metropolitan Accident Ass'n v. Freiland, 161 id. 30;) the inhaling of gas; (Travelers' Ins. Co. v. Ayers, 217 Ill. 390; Paul v. Travelers' Ins. Co., 112 N. Y. 472;) suffocation by drowning; (Mallory v. Travelers' Ins. Co., 47 N. Y. 52; Clark v. Iowa State Traveling Men's Ass'n, 156 Iowa, 201;) the eating of tainted food (Johnson v. Fidelity and Casualty Co., 184 Mich. 406,) or of poisonous mushrooms; (United States Casualty Co. v. Griffiths, 186 Ind. 126;) the opening of a pimple; (Lewis v. Ocean Accident Corp., 224 N. Y. 16;) fright caused by the insured's horse running away while the insured was riding in a covered carriage and coming near colliding with other teams though no collision occurred; (McGlinchey v. Fidelity and Casualty Co., 80 Me. 251;) under ordinary circumstances are all accidental means by which bodily injuries are produced through which death sometimes results."

The record in this case discloses that, while the assured took the gas in question voluntarily, he had no reason to expect that death or any serious consequences would ensue therefrom.

It is next contended by appellant "as a matter of fact and law, the deceased did not come to his death as result of accident, but of disease."

So far as the record discloses, the assured had no organic heart trouble, or any other organic trouble. Dr. Sedgwick, who had been practicing his profession for thirty-five years in Peoria, testified that he was the attending physician of the assured, and that about the middle of December, 1922, he made a physical examination of the assured; that "at that time he had

The record in this case discloses that, while the accused
 was riding in a covered carriage and coming
 to the intersection of the street with the street
 where the accident occurred, the horse was running away
 and the driver was unable to control it. The horse
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Neuresthenia, was excessively nervous, without physical foundation, no bodily foundation, functional neuresthenia. * * * At that time I examined his heart, lungs, urine and nervous system and took his blood pressure. I was not able to discover anything organically wrong. His heart was normal. I continued to treat him for nervousness until he went to Florida. I accompanied him to Florida. During the time he was here, his treatment was wholly mental. Mental suggestion, trying to take his mind off himself, taking him out and engaging him in games. He engaged in horseshoes and in chopping wood. He chopped vigorously. * * * He returned the middle of April, 1923. I returned in ten days. In Florida he played games and went swimming in the bay. Before he went to Florida he chopped wood. When he came back, his condition seemed good to me. His condition was much improved as regards his nervousness. His general health was good." This witness further testified that on the day prior to the extraction of said tooth, he made a physical examination of the assured; that he examined his heart and lungs; that they were normal, and that he so advised the assured.

Dr. C. U. Collins, in answer to a hypothetical question, testified that he thought "the administering of nitrous oxide gas was the cause of his (Schleicher's) condition immediately following." This witness also testified with reference to the administration of this gas that "it usually doesn't produce any permanent effect on a person to whom it is administered. There are statistics of 200,000 for the administration of gas for the extraction of teeth where there wouldn't be one patient at all and then there is the claim of one in 1,000. But not as to teeth extraction. These statistics of 1 in 100,000."

Dr. Hubbard testified that he was called to examine the assured in August, 1923, in consultation with Dr. Sedgwick; that he examined the heart and lungs and found a small amount of fluid

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that he so advised the answer.

in the pleural cavity, both right and left; found the heart irregular somewhat weakened. Mr. Schleicher complained of difficult breathing, and I found some coughing at that time and he occasionally spit blood. These conditions indicated a damaged or failing heart." In answer to a hypothetical question with reference to what might have caused the condition he found, this witness stated: "My opinion, the result could have been caused from the administration of gas!"

On the part of appellant, Dr. Lowell S. Goin testified that on May 12, 1923, he x-rayed the assured's teeth; that the x-rays indicated there were probable abscesses, which would be source of infection, as to eight of the teeth; that on October 1, 1923, he took two x-ray pictures of the assured's chest and one of the heart; that "the heart is tremendously enlarged in its long diameter, although its base is exactly normal. The interpretation of such a shadow is that the heart is associated with high blood pressure and probably disease of the aortic valve. * * * The heart is markedly enlarged. The great vessels are normal. The right costophrenic angle is obliterated. Right lung: The hilus is very markedly thickened and contains a number of calcareous nodes."

This witness further testified: "The effect of dental abscesses upon the health of the patient is that they are points of infection from which infection may enter the blood stream, lodging in the joints, producing arthritis, producing gall bladder diseases, or in the valves of the heart, producing various heart lesions. From my examination of this particular patient, I would state that the abscesses that I found in the teeth were in themselves sufficient to produce any of the above conditions. * * * I think the condition of the heart as I found it, from my examination of the x-ray picture that was taken by me, was sufficient in itself to have caused the death of John E.

Schleicher, particularly when considered in connection with the changes in the patient's lungs. * * * My opinion was that these changes in the lung were caused by the condition existing in the heart."

On the foregoing evidence, it was a question for the jury as to whether the death of the assured was the result of an accident. Unless the finding of the jury on this issue is against the manifest weight of the evidence, we would not be warranted in disturbing the same. This we are not prepared to hold.

It is next insisted that the court erred in its rulings on the evidence. It is insisted that the hypothetical questions propounded to Dr. Collins and Dr. Hubbard assumed mattered not in evidence and omitted other matters in evidence which should have been included. The specific matters which it is now claimed were erroneously omitted from and included in the question, were not pointed out in the objection made on the trial. This must have been done, in order to preserve the question on appeal. Chicago Traction Co. v. Roberts, 131 App. 477; Fuller v. Kelso, 165 App. 376-378; People v. C. V. & C. Ry. Co., 256 Ill. 286-288; C. P. & St. L. Ry. Co. v. Blume, 137 Ill. 448. However, an examination of the record does not disclose that this point is well taken, even though counsel were in a position to urge it here.

It is also insisted that the court erred in not striking the answer of Dr. Sedgwick, to the effect that the assured "died from the effect of the administration of gas on his heart." The doctor had stated in some detail the conditions that he found on his examination of the assured shortly before his death. He was then asked: "Based upon the conditions that you have testified to, from and after the time of the administration of this nitrous oxide gas on July 12, 1923, down to and including the time of his death, * * * whether or not you have an opinion

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as to what could have brought about those conditions, including his death?" An objection to the question was overruled, the witness answered that he had an opinion, and gave the above answer. The question was not objectionable, but the answer went farther than the question, and should have been stricken.

However, Dr. Goin, in his testimony on behalf of appellant, also stated conclusions. This question was asked of Dr. Goin: "In your opinion, was the condition of the heart as you found it upon your examination of the x-ray pictures that was taken by you, sufficient in itself to have caused the death of John E. Schleicher?" He answered: "I think it was, particularly when considered in connection with the changes in the patient's lungs." He was also asked: "From your experience as a physician and surgeon, and from your experience in x-ray work, would you state that the conditions that you found from an examination and reading of the x-ray pictures taken on May 12 and October 1, 1923, at your laboratory, of the teeth of John E. Schleicher, and the chest and heart of John E. Schleicher, would be sufficient to, in themselves, have caused or produced the death of John E. Schleicher at any time?" The witness answered: "It would." The answer of Dr. Goin as to the effect of the conditions found by him, went practically as far as the answer of Dr. Sedgwick. We would not, therefore, be warranted in reversing this judgment on account of the rulings of the court on the evidence.

In Snyder v. Manning, 121 Ill. 376, cited by counsel for appellants, the court at page 236 says:

"The witness had the right to state any fact he knew in relation to the capacity of the testator to transact business, and all he knew in regard to the vigor or strength of his mental powers. But whether he had the mental capacity to dispose of his property by will or deed, was a question for the jury to determine from the facts proven before them. But while the court erred in allowing the question to be answered, it was not an error of

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sufficient magnitude to reverse the judgment. The witness had stated all the facts upon which he based his opinion, to the jury, and his mere opinion could carry with it no additional weight.

It is also insisted that the court erred in allowing Dr. Sedgwick to answer, over objection, the following question: "In this case, Doctor, in your opinion did the hardening of the arteries have anything to do with the heart failure?" His answer was: "I don't think so." We see no serious error in the ruling of the court on this question. The witness was merely asked to give his professional opinion as to the effect upon the heart of the heart of the assured, produced by hardening of the arteries.

It is also insisted, with reference to the witness Hubbard, that the question propounded to him was a mixed question, partly based on his findings and partly a hypothetical question. The question asked Dr. Hubbard, strictly construed, was confined to his opinion on the condition which he had found and testified to before the jury. But, even if it included the facts assumed in the hypothetical question, appellant was not injured thereby. So considering it, it afforded an additional basis for the answer given by the witness.

We are of the opinion and hold that the court did not commit reversible error in its rulings on the evidence. City of Chicago v. Didier, 227 Ill. 571; Chicago Union Traction Co. v. Roberts, 229 Ill. 481; Fahry v. Chicago City Ry. Co., 239 Ill. 548-551.

For the reasons above set forth, the judgment of the trial court will be affirmed.

Judgment affirmed.

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...the facts upon which he based his opinion, ...
...his mere opinion ... with it no ...

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...the following ...
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...of ...
...v. ...
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For the reasons above set forth, the judgment of the ...
...is affirmed.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-_____

Clerk of the Appellate Court



Abstract

6825a

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of May, in
the year of our Lord one thousand nine hundred and twenty-eight,
within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. FRANKLIN H. BOGGS, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

249 I.A. 657³

BE IT REMEMBERED, that afterwards, to-wit: On

JUL 24 1928 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

AT A TERM OF THE SUPREME COURT

THE COURT met at 10 o'clock, A. M., on the 1st day of January, 1901, and the following cases were called on for argument:

THE STATE OF TEXAS vs. NORMAN L. JONES, Plaintiff, vs. Defendant.

FRANKLIN H. ROGGS, Attorney for Plaintiff.

HON. THOMAS H. JEFF, Attorney for Defendant.

THE COURT then proceeded to hear the case of

THE STATE OF TEXAS vs. NORMAN L. JONES.

IT IS REMEMBERED, that afterwards, to-wit: On the 1st day of January, 1901, the opinion of the Court was filed in the office of said Court, in the words and figures following:

LOTTIE MAY LEWIS, :
 ADMINISTRATRIX OF THE :
 ESTATE OF MAX LEWIS, :
 DECEASED. :
 APPELLANT. :
 V S. :
 EDWARD J. WILMERING AND :
 ALBERT RANDALL, SHERIFF. :
 APPELLEES. :

APPEAL FROM THE CIRCUIT
 COURT OF PEORIA COUNTY.

Jett., J.

The record in this case discloses that on November 3, 1922, Lottie May Lewis, administratrix of the estate of Max Lewis, deceased, appellant, filed a bill in the Circuit Court of Peoria County, alleging that in July, 1921, Max Lewis, her intestate, was the owner of a \$12,000, mortgage bond, with coupons attached, dated July 12, 1916, payable July 1, 1921, and secured by a trust deed on real estate in Peoria County, particularly described in the bill of complaint, and in which trust deed Walter G. Causey was trustee. Said mortgage bond and trust deed having been executed by Benjamin C. Koch and Bertha A. Koch, his wife.

Subsequently the bill filed on November 3, 1922, was amended. The bill as amended charges as follows:- "And your oratrix represents that the said Max Lewis, being then and there the owner of said principal note and coupon, and being desirous of collecting the same, and not desiring to appear in court as a litigant, entered into an arrangement and agreement with one Edward J. Wilmering, the defendant herein named, whereby it was agreed between them that the said bond and coupon should be turned over to the said Edward J. Wilmering, and that he, in his name, should foreclose the said trust deed and bond and coupon note, that the name of said Max Lewis should not appear in such proceedings, but your oratrix represents that said Edward J. Wilmering paid nothing

1918

APPEAL FROM THE CIRCUIT COURT OF FLORIDA COUNTY.

LOUIS MAY LEWIS, ADMINISTRATOR OF THE ESTATE OF MAX LEWIS, DECEASED. APPELLANT. V. EDWARD J. WILMOTING AND ALBERT RANDALL, GUARANTORS. APPELLEES.

1918

The record in this case discloses that on November 3, 1932, Louis May Lewis, administrator of the estate of Max Lewis, deceased, appellant, filed a bill in the Circuit Court of Peoria County, alleging that in July, 1931, Max Lewis, her intestate, was the owner of a \$12,000 mortgage bond, with coupons attached, dated July 12, 1916, payable July 1, 1931, and secured by a trust deed on real estate in Peoria County, particularly described in the bill of complaint, and in which trust deed Walter G. Garney was trustee. Said mortgage bond and trust deed having been executed by Max Lewis, his wife, Koch, his wife. Subsequently the bill filed on November 3, 1932, was amended. The bill as amended charges as follows: "And youratrix represents that the said Max Lewis, being then and there the owner of said principal note and coupon, and being desirous of collecting the same, and not desiring to appear in court as a litigant, entered into an arrangement and agreement with one Edward J. Wilmoting, the defendant herein named, whereby it was agreed between them that the said bond and coupon should be turned over to the said Edward J. Wilmoting, and that he, in his name, should foreclose the said trust deed and bond and coupon note, that the name of said Max Lewis should be removed from the record, and youratrix represents that said Edward J. Wilmoting paid nothing

for said note and coupon, and it was agreed that the same was to, and should remain at all times the sole property of the said Max Lewis; that he should have the proceeds of the same. Said amended bill further alleges that in pursuance of said agreement, appellee Wilmering, filed a bill to foreclose said mortgage bond and trust deed; that proceedings thereon ended in a sale and Wilmering bought in the property covered by said mortgage at \$17,652.75; that the master issued a certificate of purchase; thereafter, on September 26, 1921, Max Lewis died, and letters of administration were issued to appellant as his administratrix, on November 9th 1921.

It is further alleged in said amended bill that after the death of Max Lewis, Wilmering fraudulently claimed to be the owner of said trust deed and mortgage bond, and was the owner of said certificate of purchase issued on the sale of said property. It is then alleged in said amended bill that Wilmering has no interest in said certificate of purchase, but that she has a beneficial interest to the amount of \$13,302.70 with interest from the date of the certificate of purchase, and prays that the amount of the principal and interest due on said mortgage bond, as found by said decree, be paid to her as such administratrix, and in default thereof that the court order said certificate of sale to be sold and from the proceeds of the sale thereof, that she be paid said amount.

Edward J. Wilmering filed an answer to said amended bill, admitting that the note and mortgage in question, were the property of Lewis and that he turned same over to him as alleged in said amended bill; that he, Wilmering, paid nothing for the bond and coupon and it was agreed between Wilmering and Max Lewis that the same was to be, and should remain during all times, the sole property of the said Max Lewis; that the said Max Lewis should have the proceeds of the same. Wilmering further set up in his answer that about six months prior to July 1, 1921, a judgment was entered in the circuit court of Woodford County for \$10,000 against Max Lewis,

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and should remain at all times the sole property of the said Max
Lewis; that he should have the proceeds of the same. Said amended
bill further alleges that in pursuance of said agreement, appellee
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in the property covered by said mortgage at \$17,122.75; that the
master issued a certificate of purchase; thereafter, on September
26, 1921, Max Lewis died, and letters of administration were issued
to appellee as his administrator, on November 28th, 1921.
It is further alleged in said amended bill that
after the death of Max Lewis, Wilmering fraudulently claimed to be
the owner of said trust deed and mortgage bond, and was the owner of
said certificate of purchase issued on the sale of said property. It
is then alleged in said amended bill that Wilmering has no interest
in said certificate of purchase, but that his was a fraudulent interest
to the amount of \$13,802.70 with interest from the date of his ac-
quisition of purchase, and gave that the amount of the principal was
interest due on said mortgage bond, as found by said court, to said
to be a bona fide administrator, and in default thereof that the court
order said certificate of sale to be null and void and proceeds of
the sale thereof, not to be paid said amount.
Edward J. Wilmering filed an answer to said amended
bill, admitting that the note and mortgage in question, were the
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about six months prior to July 1, 1921, a judgment was entered in
the circuit court of Woodford County for \$10,000 against Max Lewis,

in favor of Mabel McFarland, administratrix; that Max Lewis, from the date of the entry of said judgment until the time of his death, had full knowledge of the existence of the judgment; that said judgment was in full force and effect at the time of the agreement entered into between said Lewis and the defendant Wilmering; that Lewis persuaded Wilmering to enter into said agreement and arrangement to foreclose said trust deed and mortgage bond for the non payment of said bond and interest, in the name of Wilmering, for the sole purpose and express intention of defrauding his creditors, and for the particular purpose and intention of preventing said Mabel McFarland, administratrix, from realizing on said judgment. In said answer, Wilmering sets forth that after said note and trust deed were transferred to him, and after he had instituted said suit, to foreclose said trust deed, that a garnishment proceeding was instituted by the said Mabel McFarland to which Wilmering was a party, and requiring him to make sworn answers to certain interrogatories, the purpose of which was to cause him to state under oath as to whether or not he was the owner of said bond and trust deed; that upon being served with summons to answer said interrogatories, he stated to Max Lewis that he did not desire to commit perjury, by alleging that he was the sole and unconditional owner of said property and that in the month of August, 1921, he stated to Lewis that he would not commit perjury, and that thereafter he purchased said bond and trust deed for the sum of \$6,000.00, with payment of costs and solicitors fees; that he paid said sum, costs and solicitors fees, and he alleges that he is the sole owner of said bond and trust deed, and the certificate that was issued by virtue of the foreclosure thereof, and denies that appellant has any interest therein.

Subsequently, on July 5th, 1923, appellant filed a supplemental bill setting forth that said property had been redeemed from said foreclosure, and that Albert Randall, the sheriff, who was

in favor of Isabel McFarland, administratrix; that Max Lewis, from the date of the entry of said judgment until the time of his death, had full knowledge of the existence of the judgment; that said judgment was in full force and effect at the time of the agreement entered into between said Lewis and the defendant Wilmering; that Isabel persuaded Wilmering to enter into said agreement and arrange-ment to foreclose said trust deed and mortgage bond for the non-payment of said bond and interest, in the name of Wilmering, for the sole purpose and express intention of defeating his creditors, and for the purpose of paying and satisfying of Wilmering's bill against Isabel McFarland, administratrix, from realizing on said judgment. In said answer, Wilmering sets forth that after said note and trust deed were transferred to him, and after he had instituted said suit to foreclose said trust deed, that a garnishment proceeding was instituted by the said Isabel McFarland to which Wilmering was a party, and regarding his so doing, Wilmering is advised by counsel that the purpose of which was to cause him to state under oath as to whether or not he was the owner of said bond and trust deed; that upon being served with process in answer to which he testified, he stated to Max Lewis that he did not desire to commit perjury, by alleging that he was the sole and unconditional owner of said property, and that in the month of August, 1921, he stated to Lewis that he would not commit perjury, and that thereafter he purchased said bond and trust deed for the sum of \$2,000.00, with payment of costs and solicitors fees; that he paid said sum, costs and solicitors fees, and he alleges that he is the sole owner of said bond and trust deed, and for said reasons that was caused by the fact that Lewis was not a party to the agreement and that Lewis was not a party to the agreement.

Subsequently, on July 5th, 1923, applicant filed a supplemental bill setting forth that said property had been redeemed from said foreclosures, and that Albert Randall, the sheriff, who was

made party defendant, had in his hands the funds arising from such redemption. Appellant then prayed that she be paid out of such proceeds the amount that would be coming to her on said bond and trust deed.

After the issues had been joined, the cause was referred to the master in chancery to take the testimony and report his conclusions thereon. The master found, among other things, that said mortgage bond and trust deed was turned over to Wilmering by Max Lewis for the purpose of hindering, delaying and defrauding his creditors, with a recommendation that the bill should be dismissed for the want of equity. On a hearing by the chancellor, a decree was entered confirming the master's report, and dismissed the bill for want of equity. This appeal is prosecuted with a view of reversing said decree. It is insisted by appellant that Max Lewis had a right to assign said note and trust deed to Wilmering for the purpose of having the same foreclosed for the benefit of Lewis; that the evidence is not sufficient to sustain the findings of the master, by the trial court, that the assignment in question to Wilmering, was for the purpose of defrauding the creditors of Lewis.

We have examined the pleadings and the evidence and it clearly appears from the bill of complaint, and the answer of the defendant Wilmering, that Max Lewis, in the month of July, 1921, was the owner of the mortgage bond and interest coupon mentioned in said bill of complaint, and as such owner was entitled to the benefit and value of said trust deed, given to secure the same, and that the mortgage bond, coupon and trust deed, at the time last aforesaid, was of the approximate value of \$12,360.; that in the month of July, 1921, Max Lewis entered into an agreement with Wilmering to take over the possession and control of said mortgage bond, interest coupon and trust deed, as the apparent owner thereof, and as such apparent owner, in his own name foreclose said trust deed and collect the proceeds thereof for the benefit of said Lewis, as is alleged in said bill of

made partly defendant, had in his hands the funds arising from such
retention. Appellant then prayed that she be paid out of such pro-
ceeds the amount that would be coming to her on said bond and trust
deed.

After the issues had been joined, the cause was
referred to the master in chancery to take the testimony and report
his conclusions thereon. The master found, among other things, that
said mortgage bond and trust deed was turned over to Wilmering by
Max Lewis for the purpose of obtaining, obtaining and obtaining the
creditors, with a representation that the bill should be assigned
for the want of equity. On a hearing by the chancellor, a decree
was entered confirming the master's report, and dismissed the bill
for want of equity. This appeal is presented with a view of over-
turning said decree. It is insisted by appellant that Max Lewis had a
right to assign said note and trust deed to Wilmering for the purpose
of having the same foreclosed for the benefit of Lewis; that the
evidence is not sufficient to sustain the finding of the master,
by the trial court, that the assignment in question to Wilmering,
was for the purpose of defrauding the creditors of Lewis.

We have examined the pleadings and the evidence and
it clearly appears from the bill of complaint, and the answer of
the defendant Wilmering, that Max Lewis, in the month of July, 1921,
was the owner of the said mortgage bond and interest coupon mentioned in
said bill of complaint, and as such owner was entitled to the benefit
and value of said trust deed, given to secure the same, and that the
mortgage bond, coupon and trust deed, at the time last aforesaid,
was of the approximate value of \$11,000; and in the month of July,
1921, Max Lewis related into an agreement with Wilmering as then owner
the possession and control of said mortgage bond, interest coupon
and trust deed, as the apparent owner thereof, and as such apparent own-
er, in his own name foreclosed said trust deed and collected the proceeds
thereof for the benefit of said Lewis, as is alleged in said bill of

complaint, and in ^upersuance of said agreement, Wilmering did take over the apparent ownership and control of said mort gage bond, interest coupon and trust deed, and foreclosed the said trust deed, and received the master's certificate of purchase, issued in said foreclosure proceedings; that redemption from said sale was afterwards made, as alleged in said supplemental bill of complaint in this cause.

The evidence further shows that prior to the time of the filing of the supplemental bill herein, the redemption money paid to Albert Randall, Sheriff of Peoria County, was by said sheriff, in good faith and without notice of any rights of the complainant thereto, paid over to the said Edward J. Wilmering as the holder and possessor of said certificate of purchase. There is no competent evidence in the record showing that Edward J. Wilmering ever purchased the mortgage bond, interest coupon and trust deed, or that he ever paid over to Lewis or his legal representatives or assigns, any consideration or money on account of said transaction, and that so far as the evidence discloses the said Wilmering still holds and retains the entire proceeds of said foreclosure proceeding, without having paid any consideration therefor.

The evidence further shows that at the September Term, 1919, of the circuit court of the County of Woodford, Mabel McFarland, on the 19th day of November, 1919, in a certain action of trespass on the case then pending in said court, recovered a judgment against Max Lewis for the sum of \$10,000 and her costs in said proceeding, and on the second day of December, 1919, she caused an execution to be issued out of said court, upon said judgment, and to be delivered to the sheriff of Woodford County, commanding him, of the lands and tenements, goods and chattels, of the said Max Lewis, he cause to be made the amount of said judgment, and that he return said execution as required by law. and that said execution was by the sheriff

complaint, and in pursuance of said agreement, Wilmering did
take over the apparent ownership and control of said bank and
bank, interest coupon and trust deed, and foreclosed the said
trust deed, and received the master's certificate of purchase,
issued in said foreclosure proceedings; that redemption from
said sale was afterwards made, as alleged in said supplemental
bill of complaint in this cause.

The evidence further shows that prior to the time
of the filing of the supplemental bill herein, the redemption
money paid to Albert Randall, Sheriff of Lewis County, was by
said sheriff, in good faith and without notice of any rights
of the complainant thereto, paid over to the said Edward J.
Wilmering as the holder and possessor of said certificate of
purchase. There is no competent evidence in the record showing
that Edward J. Wilmering ever purchased the mortgage bond, inter-
est coupon and trust deed, or that he ever paid over to Lewis
County his legal representative or assigns, any consideration or
money on account of said transaction, and that as far as the
evidence discloses the said Wilmering still holds and
retains the entire proceeds of said foreclosure proceedings,
without having paid any consideration therefor.

The evidence further shows that at the September
Term, 1919, of the circuit court of the County of Woodford,
Robert McFarland, on the 19th day of November, 1919, in a certain
action of trespass on the case then pending in said court,
recovered a judgment against Max Lewis for the sum of \$10,000
and her costs in said proceeding, and on the second day of
December, 1919, she caused an execution to be issued out of said
court, upon said judgment, and to be delivered to the sheriff
of Woodford County, commanding him, of the lands and tenements,
goods and chattels, of the said Max Lewis, or same to be sold
the amount of said judgment, and that he return said execution

of said county on the 4th day of December, 1919, duly returned "no property found."

The evidence further shows that a garnishment proceeding was instituted in the circuit court of Woodford county, and that Edward J. Wilmering with others, was a party thereto; that on the 23rd day of September, 1921, the said Edward J. Wilmering pursuant to the terms of his notice and summons, filed in said cause his answer in writing, to said interrogatories, in which answer he did assert and claim to be the true, lawful and absolute owner of said mortgage bond, interest coupon, and by said answer did particularly assert that "for a good and valuable consideration, prior to the maturity thereof, and the commencement of the suit, became the owner, and ever since has remained the true, lawful and absolute owner and legal holder of said mortgage bond and of the trust deed in question, given to secure the same."

The record further shows that a few days after this answer was filed in the garnishment proceedings, by Edward J. Wilmering, Max Lewis departed this life; that he left Lottie May Lewis his widow, who was appointed administratrix of his estate.

Without going into detail any further as to what the evidence shows, the question is, - is the complaint entitled to the relief prayed for?

In equity the party having the beneficial interest in the subject matter of the suit, must sue in his own name, for any invasion of his right with respect thereto, and no one may maintain a suit in chancery in his own name, where he has no interest therein. Winkleman vs. Kaiser, 27 Ill.21; Smith vs. Brittenham, 109 Ill.540. It is a general rule in chancery that all persons interested in the subject matter of the suit should be made parties, and that in the case of foreclosure of a deed of trust the cestuis que trust, as well as the trustee, should be

of this country on the 4th day of December, 1911, and returned to his home.

The witness further states that a commission was issued and instated in the circuit court of Western county, and that Edward J. Wilmering with others, was a party thereto; and on the 23rd day of September, 1911, the said Edward J. Wilmering presented to the terms of his notice and summons, filed in said court his answer in which he, in all particulars, in which answer he did assert and claim to be the true, lawful and legal owner of said mortgage bond, interest coupon, and of said income and principal, asserting that "for a good and lawful consideration, prior to his maturity thereof, and the commencement of the suit, Edward J. Wilmering, and one John H. Wilmering, at that time, jointly and severally owned and held title to said mortgage bond and of the interest thereon, given to them the same."

The record further shows that a few days after this answer was filed in the circuit court of Western county, Edward J. Wilmering, John Lewis (deceased) this life; that he left notice to his wife, who was appointed administratrix of his estate.

Without going into detail any further as to what the evidence shows, the question is, - is the complaint entitled to the relief prayed for? In equity the party having the beneficial interest in the subject matter of the suit, must sue in his own name, for any invasion of his right with respect thereto, and no one else. Again a suit in equity in his own name, where he has no interest therein. *Winkelman vs. Kaiser*, 27 Ill. 21; *Smith vs. Smith*, 107 Ill. 540. It is a general rule in equity that all persons interested in the subject matter of the suit should be made parties, and that in the case of foreclosure of a deed of trust the parties are those as the trustee, and all the

made parties. It is only where the beneficiaries are very numerous and they are represented by the trustee and the bonds or notes secured by the deed of trust are transferable by delivery, that it is not necessary to make beneficiaries parties to the proceeding. *St. L. & P. Railroad Co. vs. Kerr*, 153 Ill. 182-196; *C. & G. W. R.R. Land Co. vs. Peck*, 112 Ill. 408; *Rodman vs. Quick*, 211 Ill. 546; *Irish vs. Sharp*, 89 Ill. 261.

Beneficiary ownership of a mortgage, or a mortgage indebtedness, is a pre-requisite to the right to foreclose, and a court of equity will not and cannot take jurisdiction of a case which is brought by one other than the beneficial owner of the subject matter of that proceeding. *State Bank of Rock Island vs. Pope*, 179 Ill. App. 282; *Press vs. Woodley*, 160 Ill. 433.

From what is disclosed by the evidence, had Lewis himself filed the bill in question, he would not have been coming into court with clean hands. The appellant, as administratrix, stands in the same position.

A court of equity will not assist parties to an illegal transaction or one contrary to its policy, but will leave the parties in the same position in which it finds them. *The American University vs. Wood*, 294 Ill. 186-195.

It is a fundamental principle of jurisprudence that whoever appears in a court of equity for relief must do so with clean hands and with an apparently clear conscience. Or, as the maxim has sometimes been very broadly stated, 'he that hath committed iniquity shall not have equity.' Unclean hands within the meaning of the maxim of equity, is a figurative description of a class of suitors to whom a court of equity as a court of conscience will not even listen, because the conduct of such suitors is itself unconscionable - *** A court of equity cannot be successfully invoked to assist parties in taking advantage of their own deliberate wrong and willful misconduct.

[illegible]

When the parties to an illegal or fraudulent contract are in pari delicto, neither a court of equity nor a court of ^a law will aid either of them in enforcing the execution of that which may be executory, nor for that matter will it revoke or rescind that which may have been executed. Vol. 10 R.C.L. 389.

It is also insisted by appellant that the facts in this case do not even show a constructive fraud; that if there was a constructive fraud, it would not be sufficient to defeat appellant's right to recover herein.

It is not necessary to prove fraud by direct evidence, but fraud can be proved by showing the circumstances under which the transaction was entered into. The pleadings show the secret understanding that existed between Lewis and Wilmering. In Moore, Administrator vs. Wood, 100 Ill. 451, a bill was filed by the administrator for the purpose of setting aside a conveyance of real estate, executed by a debtor to a third person, on the ground that such conveyance was made to hinder and delay creditors. The court in holding that the conveyance was void as against creditors said: "A debtor cannot convey real estate to another to be held wholly or in part in secret trust for himself so as to cut off the rights of existing creditors; for, although such a transaction may be upon a valuable consideration, it lacks the elements of good faith. While it professes to be an absolute conveyance on its face, there is a concealed agreement between the parties to it, inconsistent with its terms, securing a benefit to the grantor at the expense of those he owes. A trust thus secretly created, whether so intended or not, is a fraud on creditors, because it places beyond their reach a valuable right, and gives to the debtor the beneficial enjoyment of what rightfully belongs to them.***** The trust being proved or admitted the fraud is an inference of law which the court must pronounce. ***** It is, therefore, very clear that fraud is sometimes a question of fact and

sometimes a question of law. When the question is, was there a secret trust, it is a question of fact; but when the fact of a secret trust is admitted or in any way established, the fraud is an inference of law, which the court is bound to pronounce."

In 12 R.C.L. at page 544, the author says "No effort of a debtor to hinder and delay his creditors is more severely condemned by law than an attempt to place his property where he can enjoy it, but require his creditors to await his pleasure for the payment of their claims out of it. A man cannot be the beneficial owner of property and still have it exempt from his debts. Subsequent, as well as existing creditors may have such transactions declared fraudulent." The above rule as announced in R.C.L. is quoted with approval in *Crane vs. Illinois Merchants Trust Co.* 238 Ill. App. 257.

Up to this time we have considered the case without reference to the testimony of the witness Jacobson, who was called by appellee, and without reference to the admission of Max Lewis as testified to by Jacobson. Under the rule as indicated in the foregoing authorities and as announced herein, it appears that the transfer of the mortgage bond, coupon and trust deed have been shown to be fraudulent, independent of the evidence given by the witness Jacobson. We are not unmindful of the fact that the appellant strenuously insists that the contention of appellees cannot be sustained unless the testimony of Jacobson is believed. We have carefully examined the entire record.

We have examined the evidence given by the witness Jacobson as bearing upon the allegations in the amended bill and of the admissions in the answer and with what is disclosed by the record in the taking of judgment against Max Lewis in the circuit court of Woodford county, and the subsequent proceedings thereon, and we are of the opinion that the testimony of Jacobson is corroborated in all material particulars by the allegations of the amended bill and

...a question of law. When the question is, was there a secret trust, it is a question of fact; but when the fact of a secret trust is admitted or in any way established, the trust is an inference of law, which the court is bound to pronounce."

In 12 R.O.L. at page 344, the author says "no effort of a factor to hinder and delay his creditors is more severely condemned by law than an attempt to place his property where he can enjoy it, but require his creditors to await his pleasure for the payment of their claims out of it. A man cannot be the beneficial owner of property and still have it exempt from his debts. ... as existing creditors may have such transactions declared fraudulent." The above rule as announced in R.O.L. is quoted with approval in *Grange v. Illinois Mortgages Trust Co.*, 233 Ill. App. 387.

Up to this time we have considered the case without reference to the testimony of the witness Jacobson, who was called by appellee, and without reference to the admission of Max Lewis as testified to by Jacobson. Under the rule as indicated in the foregoing authorities and as announced herein, it appears that the propriety of the mortgage bond, coupon and trust deed have been shown to be fraudulent, independent of the evidence given by the witness Jacobson. We are not unmindful of the fact that the appellant strenuously insists that the contention of appellee cannot be sustained unless the testimony of Jacobson is believed. We have carefully examined the entire record.

We have examined the evidence given by the witness Jacobson as bearing upon the allegations in the amended bill and of the admissions in the answer and with what is disclosed by the record in the finding of judgment against Max Lewis in the Illinois court of Woodbury county, and the subsequent proceedings thereon, and we are of the opinion that the testimony of Jacobson as corroborated in all material particulars by the admissions of the amended bill and

admissions of the answer thereto, together with the official record of the proceedings of the circuit court of Woodford county.

We conclude therefore that the decree of the circuit court confirming the report of the master in chancery and in dismissing the bill for want of equity, should be affirmed, which is accordingly done.

Decree affirmed.

[illegible]

Journal of the American Academy of Child and Adolescent Psychiatry 45:10 (October 2006), pp 1253-1261

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-_____

Clerk of the Appellate Court



Abstract

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of May, in
the year of our Lord one thousand nine hundred and twenty-eight,
within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. FRANKLIN H. BOGGS, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

249 I.A. 657⁴

BE IT REMEMBERED, that afterwards, to-wit: On

the opinion of the Court was filed in the

MAY 24 1928

Clerk's office of said Court, in the words and figures

following, to-wit:



| | | |
|-----------------------|---|--------------------------|
| VACUUM OIL COMPANY | : | |
| A CORPORATION, | : | |
| APPELLEE | : | |
| | : | |
| V S. | : | APPEAL FROM THE CIRCUIT |
| | : | COURT OF LASALLE COUNTY. |
| H. P. SCHLAGETER, | : | |
| DOING BUSINESS AS THE | : | |
| MAIN STREET GARAGE, | : | |
| APPELLANT. | : | |

Jett. J.

This is an action in assumpsit brought by the Vacuum Oil Company, a Corporation, appellee, in the circuit court of LaSalle County, at the March term thereof, 1922, to recover from H. P. Schlageter, doing business as The Main Street Garage, appellant for a balance claimed to be due upon a shipment of merchandise sold by appellee to appellant.

The declaration consists of one count, including common counts consolidated, to which was attached a copy of the written order for the sale of the merchandise, together with a copy of the invoice of the sale rack and of the merchandise. With the declaration was filed a copy of the account sued on and affidavit of merits. At the June term of court subsequent to the one to which suit was brought, appellee filed a bill of particulars, setting up that the cause of action was to recover the agreed price and value of merchandise, consisting chiefly of oils and greases, sold under a written order dated July 30, 1921, such merchandise being described in two invoices, one dated August 25th, 1921, covering one sale rack for \$25.00, and the other invoice dated August 26th, 1921, covering oil and grease items totaling \$2,501.42. Two items of credit totaling \$300.54 were shown, leaving a balance due of \$2225.88. To the declaration appellant filed two pleas, the first being the plea of general

ATTEST: HARRY H. ELMORE
COUNTY OF HAWAII, TERRITORY

VACUUM SILE COILS
A CORPORATION
INCORPORATED
IN THE STATE OF CALIFORNIA
V. J.
E. F. SCHMIDT
JOHN SCHMIDT & SONS
SOLE AGENTS
HAWAII

1912

This is an action in assumpsit brought by the Vacuum

Oil Company, a Corporation, appellee, in the circuit court of
Hawaii County, at the March term thereof, 1912, to recover from
E. F. Schmidt, doing business as the John Schmidt & Sons, appellant,
for a balance claimed to be due upon a shipment of merchandise
sold by appellee to appellant.

The declaration consists of one count, including
several counts consolidated, to which was attached a copy of the
written order for the sale of the merchandise, together with a
copy of the invoice of the sale and of the merchandise.
With the declaration was filed a copy of the account rendered on
and receipt of merits. At the time term of court subsequent to
the one to which suit was brought, appellee filed a bill of
particulars, setting up first the account of balance due to appellee
the above price and value of merchandise, together with
of oil and grease, and then a written order dated July 11,
1911, upon merchandise being delivered to the appellant. The
order against cash, 1911, showing the sale was for \$100.00, and
the other invoice dated August 1911, covering all the items
items totaling \$2,801.42. Two items of credit totaling \$400.00
were shown, leaving a balance due of \$2,401.42. In the declaration
appellant filed two pleas, the first being the plea of general

issue, and the second a special plea avering in substance that at the time the order was signed, appellee promised appellant that it would not sell similar merchandise to any dealer in Streator who was a cut-price dealer, particularly not to the Auto Service Company, and that any goods remaining unsold by reason of appellee's selling to cut-price dealers, should remain the property of appellee; that in violation of said agreement, appellee sold similar merchandise to the Auto Service Company, which company immediately cut the price to cost, making it impossible for the appellant to sell the merchandise at a profit, which thereupon became the property of appellee.

A demurrer was filed by appellee to the pleas, and was by the court over ruled as to the first, and sustained as to the second plea, being the special plea. At the October Term, 1926 of said court, appellant filed two additional pleas, the first to the effect that appellant signed the written order in consideration of the promise and representation of appellee that if he would make a purchase, appellee would not sell similar merchandise to any dealer in Streator who was a cut-price dealer, and particularly the Auto Service Company; that the title in said goods would be retained by appellee until sold by appellant; that appellee having notice that the Auto Service Company was a cut-price dealer, sold to the Auto Service Company in violation of said promise, similar merchandise; that the Auto Service Company immediately cut prices, making it unprofitable for appellant to sell such merchandise, and that appellant thereupon refused to sell the remaining oil and merchandise, and gave notice to appellee, to remove same; that about four years after such notice appellee did remove it.

The second additional plea was to the effect that appellee was indebted to appellant in a large sum for storage on the merchandise remaining on appellant's premises after notice to remove the same, which storage appellee refused to pay, and that

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appellant was ready, willing and offered to set off and allow appellee the amount thereof. A demurrer was sustained to the first additional plea, and overruled as to the second.

Appellant filed an affidavit of merits in which it was stated that he had a good defense to the whole of plaintiff's demand, and that his defense was that on July 30, 1921, he ordered a shipment of Mobiloil amounting to \$2501.42, besides a sales rack at \$25.00, to be shipped by the Santa Fe Railroad to Streator, F.O.B.; that said order was partly in writing and partly verbal; that the defendant received said shipment amounting to \$2526.42, and on February 16, 1922, paid \$150.00 upon the bill beside freight charges amounting to \$150.54, which were credited to him; that during the month of February, 1922, he learned that the Auto Service Company was selling Mobiloil purchased of the plaintiff, at cut prices, and that the defendant lost his customers for such oil on that account; that about the month of May, 1922, he notified the plaintiff's agent that he was holding the merchandise on hand from the above shipment, subject to the plaintiff's order; that on May 26, 1926, the plaintiff took back a part of the oil amounting to \$814.41, and on November 1, 1926, took back all that remained unsold, amounting to \$335.70; that more than four years elapsed between May, 1922 and November 1, 1926 when the last of the oil was taken back by the plaintiff, and that the storage upon said oil, which was due to the defendant from the plaintiff, was worth \$21.00 per month, which plaintiff refused to pay. Contained in said affidavit of merits is an itemized statement of amounts due to the plaintiff from the defendant, and the amount which defendant claims as credits, being cash 150.00; freight \$150.54; and merchandise returned \$1150.11 and storage; the item for storage being for fifty four months at \$21.00 per month.

[illegible]

Appellee thereupon made a motion to strike appellant's affidavit of merits from the files, which motion was by the court, overruled. In this state of the record a jury trial was had, and at the conclusion of all the evidence in the case, the court directed a verdict in favor of appellee, in the sum of \$1031.57, on which judgment was rendered and this appeal by appellant, followed.

The record discloses that appellant is in the garage business, and bought, through a traveling salesman of appellee, the merchandise in question. It is contended by appellant that the agreement was partly in writing and partly verbal. Appellant was permitted to testify over the objection of appellee, that prior to and at the time of the execution of the written order for the merchandise, appellee's agent stated that he would not sell to any dealer in Streator, who would cut the price on oil, and particularly appellant's brother, who was in the garage business in Streator. Appellant further testified that in January or February 1922, the agent of appellee called on him, at which time appellant complained that the agreement that he had had with him previously, had not been lived up to; that in May, 1922, appellant stopped selling the oil purchased from appellee and notified appellee that it should get the oil that was at its disposal; that on May 26, 1926, appellee took back oil amounting to \$814.41, and on October 1, 1926, took back all that remained, amounting to \$354.90; that the space occupied by the oil was equivalent to three stalls where automobiles could be stored, and based upon \$7.00 per month for each car, the space was reasonably worth \$21.00 per month.

The pleas remaining in the record after the sustaining of the demurrer, and on which the cause was heard, are the general issue and plea of set off. No question is

The court directed a verdict in favor of appellee, in which case

The above information was obtained from the testimony of the witness, and is being presented to you for your consideration. It is requested that you advise the Bureau of any further information that you may have regarding this matter.

The piece remaining in the record after the removal of the demonstrator, and on which the case was heard, was the small issue and piece of set 512. No mention is

raised as to the action of the court in sustaining the demurrer

It will be seen that appellant insists that appellee violated the contract by selling oil to dealers who retailed it at cut prices, and that he had a right to terminate the contract, and after notice to appellee to hold the merchandise unsold, subject to the order of appellee and to receive compensation from the storage of the same until it was removed. The right to storage is the only question involved in the case.

Appellee contends that no verbal agreement was entered into; that the contract for the oil was in writing, that it could not be varied by parol; that in May, 1922, when notice was given by the appellant to appellee, appellant was in arrears on his payment to appellee company for the oil in question, and that therefore he was not in a position to set off the damages claimed by him. The record shows that appellant was in arrears in his payment to appellee for the oil in May 1922, when the notice was given by him to appellee. The order contains a guarantee against the fall in the price of oil for four months after the sale in question was made. The fact that this condition was expressed in the order in a strong circumstance that no other condition was intended to be made a part of the contract of sale, and supports the contention of appellee that no such agreement was made; also, that the order in question, which was in writing, purported to be, and should be construed to be the contract between the parties.

In view of the state of the record, the appellant is not in a position to urge his right to a set off. In an action for fuel oil, sold and delivered, where the defendant interposed a set off for damages for breach of contract, and it appears that the defendant was in default in payment for the goods received, it could not maintain its set off for damages, as a party claiming damages for breach of contract must offer proof that he is not in default as to the agreement

to the action of the court in granting the writ.

It will be seen that appellant insists that

appellee violated the contract by selling oil to appellee and retained it at out prices, and that he has a right to damages for the oil sold, and either notice to appellee to hold the merchandise

and return, subject to the order of the court, and to receive compensation from the proceeds of the sale of the oil. The court in storage is the only question involved in the case.

Appellee contends that no wrong was done and that

appellee is entitled to the oil and the proceeds of the sale of the oil, and that appellee is entitled to the oil and the proceeds of the sale of the oil, and that appellee is entitled to the oil and the proceeds of the sale of the oil.

and the payment to appellee company for the oil in question and that therefore he was not in a position to set off the damages claimed by him. The second issue that appellee was in dispute in his payment to appellee for the oil in question, and the court was given by him to appellee. The court in this

a judgment against the bill in two parts of oil for the same amount after the sale in question was made. The fact that this condition was expressed in the order in a strong direct manner that no other condition was intended to be made a part of the contract of sale, and supports the contention of appellee

that he made a contract and delivered the oil, and that the condition, which was in writing, purported to be, and should be construed to be the contract between the parties.

In view of the state of the record, the appellant is not in a position to urge his right to a set off. In an action for the oil, sold and delivered, where the defendant has responded and set off the amount of the oil sold, and it appears that the defendant was in default in payment for the goods received, the plaintiff is entitled to a judgment for the amount of the oil sold and delivered.

It is not in a position to urge his right to a set off. In an action for the oil, sold and delivered, where the defendant has responded and set off the amount of the oil sold, and it appears that the defendant was in default in payment for the goods received, the plaintiff is entitled to a judgment for the amount of the oil sold and delivered.

It is not in a position to urge his right to a set off. In an action for the oil, sold and delivered, where the defendant has responded and set off the amount of the oil sold, and it appears that the defendant was in default in payment for the goods received, the plaintiff is entitled to a judgment for the amount of the oil sold and delivered.

It is not in a position to urge his right to a set off. In an action for the oil, sold and delivered, where the defendant has responded and set off the amount of the oil sold, and it appears that the defendant was in default in payment for the goods received, the plaintiff is entitled to a judgment for the amount of the oil sold and delivered.

which is broken. Consumer's Mutual Oil Co. vs. Western Petroleum Co. 216 Ill. App. 382. In an action for fuel oil sold and delivered the question as to the right of the defendant to maintain a set off for breach of the contract, was one of law, and on the decision that the set off could not be maintained, it was proper for the court to peremptorily instruct the jury to return a verdict for the plaintiff. Consumer's Mutual Oil Co. vs. Western Petroleum Co. Supra.

It was held in North Shore Lumber Co. vs. South Side Lumber Co. 176 Ill. App. 96, that in an action for the price of lumber delivered under a contract, the defendant, in order to maintain a claim of set off, must show that he is not in default of such contract. In suite at law, the rights of the parties must be determined as they existed at the time said suit was commenced. Voorhees vs. Mason, 182 Ill. App. 569-577-578.

In pleading a set off the defendant assumes the position of a plaintiff, and in order to recover, is required to prove the same facts which he would be required to prove if he had brought the original action on his demand. A defendant cannot recover on a matter by way of set off if his claim or demand was not due at the time the plaintiff started his action. Ellis vs. Cothran, 117 Ill. 458.

Since the only question involved is one for storage, by appellant, and since it appears that the claim for storage has arisen since the institution of the suit by appellee, no set off could be had because the right to set off must exist at the time of the commencement of the suit.

In view of the facts as we understand them, in this case, and the law arising therefrom, we think the action of the court in directing a verdict was proper and the judgment of the circuit court of LaSalle County will be affirmed.

Judgment affirmed.

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STATE OF ILLINOIS,

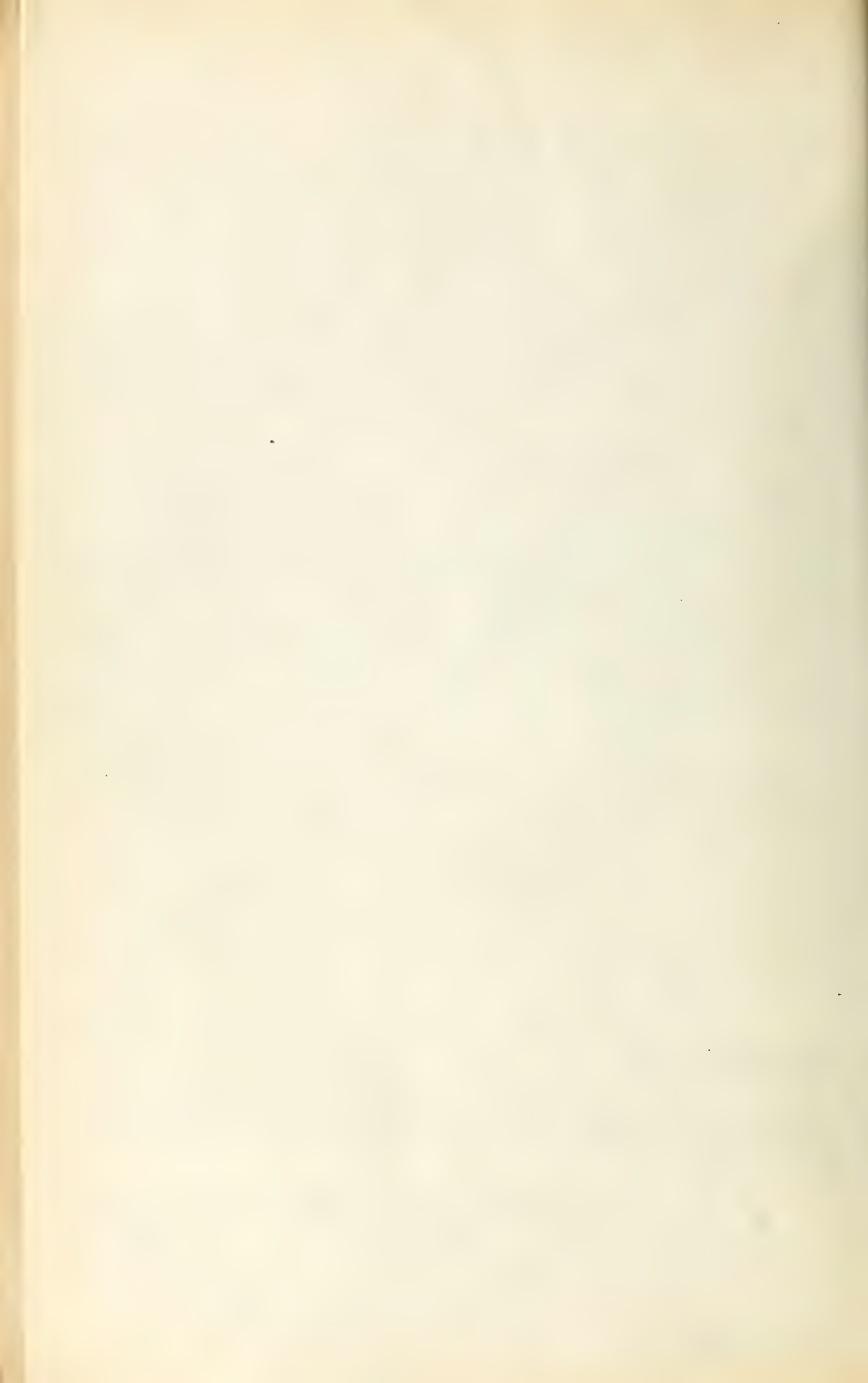
SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-_____

Clerk of the Appellate Court



Abstract

AT A TERM OF THE APPELLATE COURT,

6827
Begun and held at Ottawa, on Tuesday, the first day of May, in
the year of our Lord one thousand nine hundred and twenty-eight,
within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. FRANKLIN H. BOGGS, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

249 I.A. 657⁵

BE IT REMEMBERED, that afterwards, to-wit: On
JUL 24 1928, the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

| | | |
|-----------------------------|---|------------------------------|
| ROYAL INDEMNITY COMPANY, | : | |
| OF NEW YORK, A CORPORATION, | : | |
| APPELLANT | : | |
| | : | APPEAL FROM THE COUNTY COURT |
| V S. | : | |
| | : | OF PEORIA COUNTY. |
| OSCAR MOODY, | : | |
| APPELLEE. | : | |

Jett. J.

Royal Indemnity Company of New York, a corporation plaintiff, brought this suit in replevin against Oscar Moody, defendant, in the county court of Peoria County, to recover a certain automobile, which plaintiff claimed to be the owner and entitled to the possession.

The declaration consists of two counts; the first count avers that the defendant took the goods and chattels of the plaintiff and unjustly detained the same; the second count avers that the defendant unjustly detained the goods and chattels of the plaintiff. To the declaration the defendant pleaded four pleas. The first denies that he took the goods and chattels of the plaintiff, in the manner and form as plaintiff has complained. In the second plea the defendant denies wrongful detention of the goods and chattels in question. In the third, defendant sets up that he was the owner of the automobile in controversy and prays return of the same. The fourth states that the Monarch Finance Corporation is the owner of the property, and for that reason the plaintiff should not have his action.

A jury was waived and a hearing had by the court. On facts contained in a written stipulation, the court found the issues in favor of the defendant and plaintiff prosecutes this appeal.

As stipulated, the record discloses that on January 20th, 1926, Monarch Finance Corporation purchased from

| | | |
|-------------------------|---|----------------------------|
| ROYAL INDEMNITY COMPANY | : | BY NEW YORK, A CORPORATION |
| PLAINTIFF | : | VERSUS |
| GEORGE J. GUNN | : | DEFENDANT |

100-100000

Royal Indemnity Company of New York, a corporation
 plaintiff, brought this suit in replevin against George J. Gunn,
 defendant, in the county court of Georgia County, to recover a
 certain automobile, which plaintiff claimed to be the owner
 and entitled to the possession.

The declaration consists of two counts; the first

counts avers that the defendant took the goods and chattels of
 the plaintiff and unjustly detained the same; the second count
 avers that the defendant unjustly detained the goods and chattels of
 the plaintiff. To the declaration the defendant pleaded four

pleas. The first denies that he took the goods and chattels of the
 plaintiff, in the manner and form as plaintiff has complained.

In the second plea the defendant denies wrongful detention of the
 goods and chattels in question. In the third, defendant sets up
 that he was the owner of the automobile in controversy and prays
 return of the same. The fourth states that the Monroe Finance

Corporation is the owner of the property, and for that reason the
 plaintiff should not have his action.

A jury was waived and a hearing had by the court.

On facts contained in a written stipulation, the court found the
 issues in favor of the defendant and plaintiff presented this

100-100000

As stipulated, the record discloses that on
 January 20th, 1926, Monroe Finance Corporation purchased from

the Overland Motor Company of Chicago, the Overland automobile in question, and that afterwards on the 21st day of January, 1926, the said Monarch Finance Corporation delivered said automobile to Martin W. Conrad, doing business as the C. & O. Motor Co. of Washington, Illinois, and in accordance with a certain trust receipt; that afterwards on February 27th, 1926, said trust receipt was renewed from time to time, until on March 22, 1926, at which time said trust receipt was renewed and a new contract entered into between the parties, namely: Monarch Finance Corporation and C. & O. Motor Co. by Conrad; that the said Martin W. Conrad, also known as William Conrad, and doing business as the C. & O. Motor Co., did not pay to the said Monarch Finance Corporation any sum for said automobile, on account of said trust receipt, or any one thereof; that on or about the 13th day of March, 1926, said Martin W. Conrad, doing business as the C. & O. Motor Co., without the knowledge or consent of the Monarch Finance Corporation, entered into conditional sales contract with one Fred J. Bessler, of Washington, Illinois, for the purchase of said automobile, from the said Martin W. Conrad, for the sum of \$885.50; that said conditional sale contract contained the ordinary and regular formal provisions and conditions, including provisions that the title to said automobile should remain with the said C. & O. Motor Co., until the final payment was made upon the purchase price thereof; that the said Fred J. Bessler, at the time he so executed said conditional sales contract, was in the employ of the C. & O. Motor Co., at Washington, Illinois, and that he signed said contract at the request of a man by the name of Bolee, sales manager of the C. & O. Motor Co.; the said contract was signed by said Bessler in blank, and was not filled up at the time he signed the same; that the said Bessler, did not, at any time, pay to the said C. & O. Motor Co., or to any other person, any amount for the said automobile, and said Bessler never had possession thereof; that on the said 13th day of March, 1926, said Martin W. Conrad, also

the Cleveland Motor Company of Chicago, the Overland Motor Company in
question, and that afterwards on the 1st day of January, 1923,
the said Overland Motor Company delivered said automobile to
Martin W. Connor, doing business as the U. S. Motor Co. of
Washington, Illinois, and in accordance with a certain receipt
bearing date of January 27th, 1923, said receipt being
received from time to time, until on March 22, 1923, at
which time said receipt was renewed and a new contract entered
into between the parties, whereby the said Overland Motor Company
delivered to the said Martin W. Connor, also
known as William Connor, and doing business as the U. S. Motor
Co., said car to the said Overland Motor Company and any
for said automobile, on account of said receipt, on any one
thereof, that on or about the 15th day of March, 1923, said Martin
W. Connor, doing business as the U. S. Motor Co., without the
knowledge or consent of the said Overland Motor Company, entered
into a conditional sales contract with the said Martin W.
Washington, Illinois, for the purchase of said automobile, from
the said Martin W. Connor, for the sum of \$333.00; that said
conditional sales contract contained the following and certain terms
provisions and conditions, including provisions that the title
to said automobile should remain with the said U. S. Motor Co.,
until the final payment was made and the contract was fully paid;
that the said Fred J. Bealer, at the time he no executed said
conditional sales contract, was in the employ of the U. S. Motor
Co., at Washington, Illinois, and that he signed said contract
at the request of a man by the name of Boles, sales manager of the
U. S. Motor Co.; the said contract was signed by said Bealer in
front, and was not filled up at the time he signed the same; that
the said Bealer, did not, at any time, pay to the said U. S.
Motor Co., or to any other person, any amount for the said
automobile, and said Bealer never had possession thereof; that
on the said 15th day of March, 1923, said Martin W. Connor, also

known as William Conrad, and doing business as aforesaid, executed an assignment of said conditional sales contract to the Commercial Investment Trust; that the consideration of the assignment of said contract was \$600.00, paid by the said Commercial Investment Trust to said Conrad; that on the 30th day of June, 1926, the said Commercial Investment Trust assigned said contract to Royal Indemnity Company, the plaintiff herein; that the said Martin W. Conrad, doing business as aforesaid, remained in possession of said Overland automobile from the 21st day of January, 1926, until on or about the 23rd day of April, 1926, at which time said Monarch Finance Corporation demanded possession of said automobile from the said Martin W. Conrad, in the City of Washington, Illinois, on or about the said 23rd day of April, 1926, and that the said Monarch Finance Corporation thereupon removed said automobile to the city of Peoria, Illinois; that the said Monarch Finance Corporation retained possession of said automobile until about the first day of June, 1926, at which time the said Monarch Finance Corporation sold and delivered said automobile to the defendant herein, Oscar Moody, for the sum of \$500.00 cash, paid by Moody to the said Monarch Finance Corporation; that the said Oscar Moody, at the time he purchased said automobile from said Monarch Finance Corporation had no notice of the said condition^{al} sales contract between the said C. & O. Motor Co., and the said Fred J. Bessler, or any assignment of said contract, and believed the said Monarch Finance Corporation to be the owner of said automobile and to have full right and authority to sell the same to said Oscar Moody; that the said Royal Indemnity Company obtained said Overland automobile by writ of replevin from the said defendant, Oscar Moody, on July 14th, 1926, and said writ of replevin was regularly issued and properly served by the sheriff of Peoria County, Illinois, on the said Oscar Moody; that the value of said automobile on July 14th, 1926, was \$750.00

known as "WILLIAM CONRAD", and being business as otherwise, and
an assignment of said conditional sales contract to the
Investment Trust; that the consideration of the assignment of
said contract was \$25,000, and that the said assignment was
made to said Conrad, that on the 30th day of June, 1935, the said
Conrad Investment Trust assigned said contract to Royal
Indemnity Company, the plaintiff herein; that the said
Conrad, being business as otherwise, remained in possession of
said overland automobile from the 31st day of January, 1935, until
on or about the 2nd day of April, 1935, at which time said
Finance Corporation demanded possession of said automobile from
the said W. Conrad, in the City of Washington, Illinois,
and on about the said 2nd day of April, 1935, and that the said
Monarch Finance Corporation removed said automobile to
the City of Peoria, Illinois; that the said Monarch Finance
Corporation retained possession of said automobile until about the
first day of June, 1935, at which time the said Monarch Finance
Corporation sold and delivered said automobile to the defendant
Dexter Moody, for the sum of \$500.00 cash, paid by check
to the said Monarch Finance Corporation; that the said
Moody, at the time he purchased said automobile from said
Finance Corporation had no notice of the said conditional sales
contract between the said U. & C. Motor Co., and the said
Dexter, on any assignment or said contract, and believed the
said Monarch Finance Corporation to be the owner of said automobile
and to have full right and authority to sell the same to said
Dexter Moody; that the said Royal Indemnity Company obtained said
overland automobile by writ or replevin from the said defendant,
Dexter Moody, on July 14th, 1935, and said writ or replevin was
returnable issued and property removed by the Sheriff of Peoria
County, Illinois, on the said Dexter Moody, and the value of said
automobile on July 14th, 1935, was \$750.00.

The stipulation further discloses the fact that on April 24th, 1926, involuntary petition in bankruptcy was filed against Martin W. Conrad, and adjudication in bankruptcy followed. For the purposes of this opinion the appellant will be called plaintiff, and the appellee, defendant.

In an action of replevin, the plaintiff must recover upon the strength of his own title, and if such title is denied, he has the burden of showing a general and special property in the goods. The issue raised by a plea of property, in the defendant, is not whether the property is in the defendant, but whether the right of property and the right to immediate possession are in the plaintiff, and the burden of proof is upon the plaintiff to show such rights. Pease vs. Ditto 189 Ill. 456; Perkins vs. Knisely 204 Ill. 275. The question then arises has the plaintiff shown the right of the property to be in him, and the right to immediate possession thereof?

Under the trust receipt taken by the Monarch Finance Corporation of Conrad, Conrad could sell the car in question for the account of the Monarch Finance Corporation for \$425.80. The conditional sales contract to Bessler by Conrad provided that Bessler should pay in all \$885.50, \$280.00 to be in cash and the balance to be in payments, to be made in eleven payments of \$50.45 each, and one payment of \$50.55.

The stipulation discloses that Bessler in fact did not pay anything whatever on the conditional sales contract, either in cash or other wise, and that he never obtained possession of said car, but that the possession of the car remained with Conrad.

The stipulation also is to the effect that Bessler, at the time he executed the conditional sales contract, was in the employ of Conrad, who was doing business as the C. & O. Motor Co., On the assignment of the conditional sales contract to the Commercial Investment Trust, Conrad received \$600.00

On the construction of the assignment of the conditional sales contract to the Commercial Investment Trust, by Conrad and on the authority given to Conrad under the trust receipt from the Monarch Company, hangs the decision of this case.

It is the contention of the plaintiff that Conrad had the right to sell the car in question for a cash payment of \$425.80; that the assignment of the conditional sales contract to the Commercial Investment Trust, was in fact a sale to said Commercial Investment Trust, under the authority given to Conrad, under the trust agreement from the Monarch Company. On the other hand the defendant insists that the assignment of said conditional sales contract to the Commercial Investment Trust, through whom plaintiff claims transferred only the right of Conrad in such conditional sales contract and was not intended as a sale for cash of the car in question; that the car was not delivered by Conrad to the Commercial Investment Trust, but was retained by him, Conrad, and the Monarch Company had the right to re-possess itself of the car in question as against Conrad, and that the Commercial Investment Trust obtained no greater right under the assignment of the conditional sales contract than Conrad had.

In other words, it is the contention of the defendant that Conrad was not in a position to hold the car in question as against the Monarch Company, not having sold the car for cash as provided in the trust receipt, but having sold it in violation thereof under the conditional sales contract, in which he in fact, received no cash payment; that the Commercial Investment Trust in taking the assignment of the conditional sales agreement, took it with notice, and acquired no greater right to the car in question than Conrad had.

The plaintiff contends that this assignment of the conditional sales contract is dual in its nature: (1) that it is an assignment of the contract, and (2), it is a bill of sale of the car to the Commercial Investment Trust.

In construing this contract it should be borne in mind that both the conditional sales contract, and its assignment to the Commercial Investment Trust, bear date of March 13, 1926; that the conditional sales contract between Conrad and Bessler was in full force and effect and not forfeited by Conrad; that Conrad, after entering into the contract with Bessler, and while it was still in force, had no right to sell the car to any other person, but did have the right to assign the contract to a third party. Under the law, this conditional sales contract was binding on Conrad, and Bessler had the right to become the absolute owner of it upon payment of the purchase price, as provided by contract. In the case of Tarr vs. Stearman, 185 Ill. App. 45-53, the court quoted from 6Am. & E. Ency. of Law, 447 as follows: "The delivery of personal property under a contract that the party receiving it is to pay for it in installments, at specified times, and when so paid for, it is to become his property, but that the title is to remain in the original owner until all the purchase money has been paid, constitutes a familiar example of a conditional sale." The language used in assigning "all right, title and interest in and to the property therein described," merely means that the assignee, Commercial Investment Trust, was placed in exactly the same position with regard to the car that Conrad, the assignor stood in prior to the assignment; that is if Bessler forfeited his right under the contract, the assignee, Commercial Investment Trust, might take possession of the property, and in such case "take all such legal proceedings or otherwise as the undersigned (Conrad) might have taken, save for this assignment."

The contention of appellant that the assignment is both an assignment of the conditional sales contract, and an absolute bill of sale of the car to the Commercial Investment Trust, is inconsistent. The assignment recognizes the validity of the sales contract, under which Bessler was given the right

The court in the case of *Commercial Investment Trust v. Commercial Investment Trust*, 1911, 100 Cal. 1, 12 P. 2d 1, 13 P. 2d 1, 14 P. 2d 1, 15 P. 2d 1, 16 P. 2d 1, 17 P. 2d 1, 18 P. 2d 1, 19 P. 2d 1, 20 P. 2d 1, 21 P. 2d 1, 22 P. 2d 1, 23 P. 2d 1, 24 P. 2d 1, 25 P. 2d 1, 26 P. 2d 1, 27 P. 2d 1, 28 P. 2d 1, 29 P. 2d 1, 30 P. 2d 1, 31 P. 2d 1, 32 P. 2d 1, 33 P. 2d 1, 34 P. 2d 1, 35 P. 2d 1, 36 P. 2d 1, 37 P. 2d 1, 38 P. 2d 1, 39 P. 2d 1, 40 P. 2d 1, 41 P. 2d 1, 42 P. 2d 1, 43 P. 2d 1, 44 P. 2d 1, 45 P. 2d 1, 46 P. 2d 1, 47 P. 2d 1, 48 P. 2d 1, 49 P. 2d 1, 50 P. 2d 1, 51 P. 2d 1, 52 P. 2d 1, 53 P. 2d 1, 54 P. 2d 1, 55 P. 2d 1, 56 P. 2d 1, 57 P. 2d 1, 58 P. 2d 1, 59 P. 2d 1, 60 P. 2d 1, 61 P. 2d 1, 62 P. 2d 1, 63 P. 2d 1, 64 P. 2d 1, 65 P. 2d 1, 66 P. 2d 1, 67 P. 2d 1, 68 P. 2d 1, 69 P. 2d 1, 70 P. 2d 1, 71 P. 2d 1, 72 P. 2d 1, 73 P. 2d 1, 74 P. 2d 1, 75 P. 2d 1, 76 P. 2d 1, 77 P. 2d 1, 78 P. 2d 1, 79 P. 2d 1, 80 P. 2d 1, 81 P. 2d 1, 82 P. 2d 1, 83 P. 2d 1, 84 P. 2d 1, 85 P. 2d 1, 86 P. 2d 1, 87 P. 2d 1, 88 P. 2d 1, 89 P. 2d 1, 90 P. 2d 1, 91 P. 2d 1, 92 P. 2d 1, 93 P. 2d 1, 94 P. 2d 1, 95 P. 2d 1, 96 P. 2d 1, 97 P. 2d 1, 98 P. 2d 1, 99 P. 2d 1, 100 P. 2d 1.

to become absolute owner of the car upon his paying the purchase price. If the instrument was a bill of sale, it would convey the title to Commercial Investment Trust. Thus the claim of title might be in two different persons under the same instrument. The instrument must be an assignment or a bill of sale. It cannot be both. If the instrument is construed as a bill of sale, then the assignment of the conditional sale contract, has to be entirely disregarded, but if it is construed as an assignment, with the right of the assignee to take up the car in case of a breach by Bessler, then the whole instrument is given effect.

In the case of Heirich & Micotte vs. Loirmer & Gallagher 196 Ill. App. 564-567, the court said "When construing contracts the whole instrument must be considered and such construction given as to give force and meaning to every part of it, if possible." The plaintiff, Royal Indemnity Company, took an assignment of the Bessler conditional sales contract, dated June 30, 1926, which is in substantially the same form as the assignment to Commercial Investment Trust. Prior to that time the Monarch Finance Corporation had, on April 23, 1926, taken possession under its trust receipt and had made sale of it to the defendant Oscar Moody, on June 1, 1926, for \$500.00, and Moody had taken possession of it. If the Commercial Investment Trust, on June 30th, construed the assignment dated March 13, 1926, which it had received from Conrad as a bill of sale, and considered itself as an absolute owner, why did the said Commercial Investment Trust give plaintiff, Royal Indemnity Company an assignment of the conditional sales contract instead of the ordinary bill of sale? The assignment itself shows how the instrument was regarded by the parties thereto.

It is also claimed by plaintiff that the Commercial Investment Trust, under Section 24, of the Uniform Sales Act, was the purchaser of the car for value, without notice of the seller's defective title. This cannot be so for two reasons;

It is a common mistake to suppose that the assignment of a bill of exchange is a mere transfer of property in the bill. It is not so. The assignment of a bill of exchange is a transfer of property in the bill, but it is also a transfer of the right to sue on the bill. The assignee of a bill of exchange is not a mere transferee of property, but he is also a transferee of the right to sue on the bill. This is the true nature of the assignment of a bill of exchange.

[illegible]

was the purchaser of the car for value, without notice of this
seller's defective title. This cannot be so for two reasons:
Investment Trust, under Section 24, of the Uniform Sales Act,

(1), It did not buy the car, it only bought the conditional sales contract; (2), it had notice that Conrad had already sold the car to Bessler and Conrad was powerless to again on the same day re-sell the car, to Commercial Investment Trust. In Colburn, et al vs. Commercial Security Co., 172 Ill. App. 510-513, the court considered an assignment of a conditional sale contract, which also contained a clause transferring the right of the assignor in the pianos covered by the conditional sale contract, and the court construed the instrument as an assignment of the conditional sale contract.

Furthermore, under the trust receipt, which constituted Conrad bailee of the car, he had the right to sell it as agent of the bailor Monarch Finance Corporation, for cash, for not less than \$425.80. We have already seen that on March 13, 1926, Conrad sold the car to Bessler for \$885.50, and took from him a conditional sales contract; that while the contract recited that Conrad had received from Bessler a cash payment of \$280.00 and the balance of \$605.50 was to be paid by Bessler to Conrad in monthly payments. The record discloses that Bessler, as a matter of fact, did not pay Conrad any sum in cash for the car at the time of the sale. Conrad did not carry out the terms of his bailment contract, and make sale for at least \$425.80 cash. The title therefore to the car did not pass as to the Monarch Finance Corporation, and that the Finance Corporation had the right, on April 23, 1926, to take possession of the car. We are not unmindful that the plaintiff insists that on March 13, 1926, the same day that the conditional sales contract was entered into with Bessler, Conrad sold the car to the Commercial Investment Trust, for \$600.00 cash, and that this alleged sale passed title to the Commercial Investment Trust, and that the said Commercial Investment Trust assigned its rights in the car to the plaintiff, on June 30, 1926. We have already seen that Conrad did not sell the car to the Commercial Investment Trust but only assigned his conditional sales contract to it; that under such assignment Commercial Investment Trust merely stood in the

shoes of Conrad, that the assignment did not in any way affect the right of the Monarch Finance Corporation to take possession of the car on April 23, 1926.

The relation between Monarch Finance Corporation and Conrad from the 21st day of January, 1926, to the 23rd day of April, 1926, when the defendant re-possessed itself of the car, was that of bailor and bailee. In *Re Reboulin Fils & Co.* 165 Fed. 245. During the period in which Conrad was bailee, the Monarch Finance Corporation was the owner of the car. In *Re. Coe* 183 Fed. 745.

The arrangement provided for in the trust receipt has been held valid in a number of Federal cases. The Federal cases hold that the title of the bailor is good, even against a trustee in bankruptcy, who, under the 47th section of the Bankruptcy Act, as amended in 1910, stands in the position of execution creditor. In *Re Reboulin Fils & Co.*, *Supra*: *Roth vs. Smith* 215 Fed. 82; In *Re Dunlap Carpet Co.*, 206 Fed. 726.

The conditional sales contract between Bessler and Conrad shows that Conrad attempted to sell the car on the cash payment of \$280.00 and the balance of the purchase price on credit. We have seen, as a matter of fact, Bessler did not pay any sum in cash for the car. In Vol. 2, *Corpus Juris* 559, the author discussing sales made by agents for cash or on credit, says: "As a general rule the sale must be for cash only, and in the absence of special authority, mere authority to sell, does not give the agent authority to sell on credit." The same author also in the same volume on page 562, in discussing the duty of a third person to ascertain the authority of the agent says; "Every person who undertakes to deal with an alleged agent is, by the mere fact of the agency, put upon inquiry, and must discover at his peril, that it is in its nature and extent sufficient to permit the agent to do the proposed act, and that its source can be traced to the will of the alleged principal."

above of Council, that the...
the right of the...
of... on April 10, 1910.

The...
and... from the... at... 1910, to the...
of April, 1910, when the... re-possessed itself of the car.
was that of... and... In the...
1910, during the period in which... was...
... Corporation was the owner of the car. In the...
1910.

The... provided for in the...
has been held valid in a number of... cases. The...
cases hold that the title of the car is good, even...
... is...
... in 1910, stands in the position of...
... In the...
In the... Co., 208 Neb. 788.

The conditional sales contract between... and
Council shows that Council attempted to sell the car on the...
payment of \$280.00 and the balance of the purchase price on
installments. We have seen, as a matter of fact, Council did not pay
any sum in cash for the car. In Vol. 2, Council...
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... in the... on page 622, in... the...
... person to ascertain the... of the...
... was undertaken to deal with... is, by...
... of the agency, but upon inquiry, the...
... that it is in the... and...
... the agent to be the proposed... and that the...

Without extending this opinion we conclude that the weight of authority sustains the contention of the defendant; that the assignments of the Bessler sales contract are assignments only, and not bills of sale; that on July 14, 1926, when the car was replevined by the plaintiff, it was the property of the defendant, as alleged in his third plea; and that the finding and judgment of the county court of Peoria County was proper and in accordance with the law and evidence, and should be affirmed, which is accordingly done.

Judgment affirmed.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-_____

Clerk of the Appellate Court

6738a
General No. 8072

Agenda No. 1

APRIL TERM, A. D. 1927

James J. McCarty, Conservator of John Condon,
Defendant in Error,

vs.

S. H. Cummins, Plaintiff in Error.

249 I.A. 658'

Error to the Sangamon County Circuit Court

SHURTLEFF, P. J.

We shall denominate the parties as plaintiff and defendant respectively. Defendant sued out a writ of error from a judgment for \$1246.83 entered against him in the Circuit Court of Sangamon County. The judgment was founded upon a promissory judgment note dated March 3, 1920. The defendant was given leave to plead to the declaration and presented an offset, amounting to about the same amount as the note, for attorney's fees and costs claimed to have been for services rendered and amounts paid respectively by defendant for plaintiff during the year 1920, which were brought about by a suit commenced by one Hance against plaintiff in the Circuit Court of Edgar County for the specific performance of a contract to convey lands, and by a similar suit commenced by one Henry Crede in the same county.

On October 12, 1926, defendant, by leave of court, amended his notice of setoff to include an item of \$217.87, the same being for one-half of the taxes which were paid by defendant March 8, 1920, upon certain lands in Piatt county in which defendant and Condon were jointly interested. There was a verdict and judgment for plaintiff, conservator.

Defendant was permitted to show that he paid the taxes in the amount and at the time mentioned, and by verbal testimony that the title to said lands had passed to Condon by some kind of an instrument on January 6, 1920. The court sustained an objection

to the question: "Do you know who was liable for the taxes in that case?" put to the witness Barnes who had conveyed the land to Condon. No attempt was made to produce or show the contents of the instrument of conveyance. Defendant complains of the ruling. The ruling was not error and furthermore the item was barred by the statute of Limitations, which was properly pleaded.

Defendant presented an account book, in which he testifies that he entered the items of account at the time each transaction occurred. The entire book went to the jury and from the testimony and the book the jury were permitted to come to the conclusion that the entries were made at a comparatively recent date. Plaintiff produced and put in evidence a cancelled check, showing that defendant had been paid in full for all of his charges for costs and expenses under date of July 1, 1920. Plaintiff further produced in evidence a written agreement signed by defendant and said Condon, under date of April 21, 1920, defining fully defendant's and said Condon's interests and rights in the Piatt County lands. As to all of the defendant's charges in connection with the Henry Crede litigation, it is agreed that said defendant should make no charge, but the same was provided for in said contract upon the sale of said Piatt County lands after the payment of prior encumbrances. Evidently, the Piatt County lands have not been sold.

As to the item of five hundred dollars for services in connection with the Hance suit, Hance was produced as a witness by defendant and testified that Frank T. O'Hair, a lawyer of Paris, tried the suit for Condon. There is no testimony in the record showing the amount or value of the services performed. Defendant while on the witness stand interjected voluntarily the remark: "I had an agreement with him (Condon) he was to give me five hundred dollars for that case." This statement, together with the record showing defendant's name attached to plaintiff's answer in that cause as solicitor and with the book account, constitutes all of the proofs

in the record as to that item. The book account was thoroughly discredited and defendant, under the statute, was an incompetent witness to testify as to the claim. There were other items in the notice of setoff as to which no proofs were offered.

Defendant assigns error upon the giving of certain instructions for plaintiff. The first instruction charged the jury: "That where real estate was sold on the 6th day of January, 1920, and no special agreement was made with reference to the taxes assessed against said real estate for the year 1919, which taxes are payable in 1920, it is the duty of the seller, under the law, to pay the same." Under the proofs in this case defendant could not have been prejudiced by the instruction.

The second instruction informed the jury: "That the defendant has filed a defense of setoff; that by a defense of setoff, the defendant admits liability for the amount of the note sued upon but claims that the deceased John Condon was indebted to him on other and distinct matters and particularly for services rendered the said John Condon and money advanced to him or for his use at his request and the burden of proof is upon the defendant to prove by a preponderance of the evidence that such services or some portion of the same was rendered to the said John Condon at his request and further that the said John Condon agreed to pay for the same either a specific sum or sums or the usual and customary price or charge for the same, which usual and customary price must be shown by the evidence." While the instruction omitted the element of implied contract and was technically erroneous under the proofs in this case, we cannot conclude that in the least degree it misled the jury.

On behalf of defendant there was read to the jury the following affidavit, the contents of which became evidence in the case:

"It is stipulated and agreed that these witnesses, George C. Dill and Thomas Bryan would, if present, testify that they were present and heard a settlement between Mr. Condon and Mr. Cummins about this note and that Mr. Condon told Mr. Cummins the note was in the bank and he would get it the next day and send it to Mr. Cummins, and the next day he did not send it, and he told Mr. Dill the reason he did not send it was because McCarty told him not to. This was on the 21st day of September, 1920. Mr. Cummins had his book of account and Mr. Condon had his and they went over their accounts pro and con. That is the same book and Mr. Condon had his bank book and they went over it thoroughly, and Mr. Condon promised Mr. Cummins to send him the note, and they settled there."

This testimony was submitted to the jury with three separate instructions for the defendant to the effect that if the jury believed from a preponderance of the testimony that the statements of the witnesses recited in proper form were true, they should find for the defendant. It is to be noted that the affidavit does not state where the "settlement" took place. No items of account are mentioned and no facts stated which would show that any specific accounts were presented to Condon or that he gave credit on the particular note sued upon for any such accounts. The statement does not identify the note and in point of time the occurrence is said to have taken place but one week before Condon was adjudged a demented person. It is pointed out that no basis is shown upon which the amount due on the note could have been considered as paid or settled, "and any attempt to obtain it under such circumstances was merely an attempt to take advantage of the situation."

Defendant's so-called "book account" and the presentation of it unexplained, evidently colored his whole cause. There were eighty-one pages in the book devoted to accounts and plaintiff's account appeared on page eighty-one, beginning with February 9, 1920. Many preceding pages were devoted to accounts commencing at a much later date. The index showed Condon's account at page twelve, but page twelve had been torn from the book. Two items

under Condon's name appeared on page fourteen, and the remainder of the page was unused. The jury saw and examined the entire book and formed their own conclusions. While there is some technical error in the giving of instructions, we are of the opinion that none of the errors under the proofs in this case misled or prejudiced the jury and that substantial justice has been done. Accordingly, the judgment of the Circuit Court of Sangamon County is affirmed.

Affirmed.

Abstract

Jan 25-1928

249 I.A. 658²

General Numbers 8117 and 8128

Agenda No. 50

APRIL TERM, A. D. 1927

Knights of the Ku Klux Klan, Inc., Appellee,

vs.

First National Bank, Charles A. Wanless, James H. Ashby, E. M. Pottorff, Jos. Bebb, A. R. Millard, Dr. J. B. Watts, Lyman E. Smith, C. E. Day, Dewey Cramer, Elmer Shanklin, J. W. Dugger, James Livingstone, S. L. Myers, as officers of Abraham Lincoln Klan No. Three, located at Springfield, Illinois, and as individuals; their officers, clerks, attorneys, servants, agents, employees, workmen, confederates and each of them, Appellants.

Appeal from the Circuit Court of Sangamon County

SHURTLEFF, P. J.

We shall refer to the parties as complainant and defendants. This suit was based upon a bill in equity, praying that the defendants be required to account, an injunction and other relief. There was a hearing and a decree entered under date of July 8, 1925, finding and determining the rights of the parties and requiring the defendants to account. No appeal was prayed or taken from this decree. The cause was again referred to the master to hear the proofs and state an account, which resulted in proofs being taken, a second report by the master stating the account, and a decree under date of September 8, 1926, determining the account, and from this decree defendants have appealed and the same is now pending in this court. Thereafter, the defendants sued out a writ of error to bring up the entire record, and said cause is now pending in this court as General Number 8128. Defendants as plaintiffs in error have moved the court to consolidate the two causes, which motion has been allowed, while complainant (defendant in error) has moved to dismiss the writ of error upon the ground that the cause sought to be reviewed by writ of error was pending in this court upon appeal at the time the writ was issued, and

that a writ of error will not lie to bring up a cause while an appeal is pending. The motion has been taken with the case. We can not agree with complainant's contention. The two decrees, while growing out of the same cause of action, are separate, independent decrees and an appeal would lie from each. There is a distinction between an appeal and a writ of error. In a similar case, **Drummer Creek Drain. Dist v. Roth**, 244 Ill., 71, the court held: "A decree which finally fixes the rights of the parties must be appealed from within the time allowed by statute, and is not subject to review by an appeal from a later decree not involving such rights. (**Gray v. Ames**, 220 Ill. 251; **DeGrasse v. Gossard Co.** 236 id. 73.) * * * 'A writ of error to a final judgment brings up the whole record.' (7 Ency. of Pl. & Pr. p. 899, and cases cited.) It has been held that a writ of error by one party brings up the entire record, and if any error exists to the prejudice of any party it may be corrected, whether it be in the judgment to which the writ of error was taken or in another in the same case. (**Morgan v. Ohio River Railroad Co.** 39 W. Va. 17.) While this court has held that in partition proceedings the decree which finally adjudicated the rights and interests of the parties could not be reviewed on appeal from a later decree in the same proceeding which did not affect such interests of the parties, (**Crowe v. Kennedy**, 224 Ill. 526; **Piper v. Piper**, 231 id. 75;) we have also permitted, in partition proceedings, the original decree fixing the rights of the parties and a later decree taxing costs against certain of the parties to be reviewed by one writ of error. (**Smith v. Roath**, 238 Ill. 247.) All the final orders complained of in these proceedings have properly been brought to this court by this one writ of error. To review them by one writ of error tends to prevent multiplicity of suits and simplifies litigation. Such a practice is in harmony with the authorities and supported by sound reason."

It would seem to follow that the writ of error supplanted the appeal and brings up the entire record, and that complainant's motion should be denied.

From complainant's bill of complaint we conclude that complainant is not a corporation for pecuniary profit, but is purely beneficial and eleemosynary and is for the purpose of conducting a patriotic, secret, social benefit order. "That its object is to unite white male persons, native born Gentile citizens of the United States of America, who owe no allegiance to any foreign government, nation, institution, sect, ruler, person or people, whose reputation and vocations are respectable, whose habits are exemplary, who is of sound mind and eighteen years or more of age, under a common oath into a brotherhood of strict regulations; to cultivate and promote patriotism towards our civil government, to practice and cultivate Klanishness toward each other; to exemplify and practice benevolence; to shield the sanctity of the home and the chastity of womanhood; to maintain forever white supremacy; to teach and faithfully inculcate a high spiritual fellowship through an exalted ritualism, and by practical devotion to conserve, protect and maintain distinctive institutions, rights, privileges, persons, traditions, and ideals of pure Americanism."

That its said charter gives it power to confer initiative degrees, ritualism and so forth, that it has the right in itself to own and control the sale of paraphernalia, regalia, jewelry, materials, etc., used in said order, to hold real and personal property for the purposes of the organization, to borrow money and make transactions, etc. The bill further alleges the general authority of the said Knights of the Ku Klux Klan and to delegate its powers.

It is alleged that in 1923 said complainant established a subordinate state branch or realm organization in the State of



Illinois, which was authorized to create and establish local branches throughout the State; that by means thereof many members have become a part of said organization that has been established throughout the State, many local organizations, all subordinate state organizations with thousand of members; that the defendant, First National Bank was made depository for Abraham Lincoln Klan No. 3 at Springfield, Illinois; and that it now has on deposit approximately \$11,900.00 of the funds of Abraham Lincoln Klan No. 3; that certain of the defendants held respective offices in said Abraham Lincoln Klan No. 3 and carried out certain necessary ritualistic work incident to their said offices.

The charter powers of said complainant are set out in the bill of complaint, together with certain by-laws adopted by the organization as follows: Section twenty of article eighteen reads:

“A Klan under any and all circumstances shall accord full respect to its charter, and thereby strictly observe the Constitution and Laws, mannerisms, usages and Kloranic (ritualistic) regulations and requirements of this Order as the same are promulgated by the Imperial Wizard; and shall give due respect and obedience to all Imperial, Realm and Provincial decrees, edicts, mandates, rulings and instructions issued by the said officers; and failure on the part of a Klan to do so shall be cause for revocation of its charter and the suspension of its entire membership from this Order.”

Section twenty-three of article eighteen provides:

“In the event the charter of a Klan has been revoked or cancelled for any cause whatsoever, and in the event of disbandment of a Klan, whether it be a chartered or provisional Klan, all monies of that Klan in the possession of any officer or member thereof shall automatically become the actual monies of the Imperial Treasury of this Order and same must be freely and promptly turned over on demand to the properly accredited officer who is authorized by the Imperial Wizard to receive same in the name of

this Order also all books, papers, manuscripts, Klor-ans, records, seals, Klan paraphernalia, regalia, robes, helmets and any and all other things used by the Klan, and all articles or things appertaining to this Order as may have been used by or are in the possession of any individual member thereof."

Section twenty-five of article eighteen provides:

"No Klan or member shall use the name of this Order or any part thereof for any purpose that contravenes in any manner the laws of the land, that will reflect or probably reflect, upon the reputation and good name, or compromise, or injure this Order, or any member thereof, in any way."

And section sixteen of article eighteen provides:

"When a Klan becomes in arrears in payment, of its Imperial, Realm or Provincial tax for a period of one hundred days, its several offices are automatically vacated, its members denied visiting privileges in other Klans, and its acts subsequent thereto are invalid unless the time is extended by the Grand Dragon in organized Realms, either of whom shall have the authority to order a complete audit of this Klan's affairs at the expense of the local Klan."

It was further alleged that the properly accredited officer authorized by the Imperial Wizard, to receive in the name of this Order, all the monies and other property set forth in Section Twenty-three of Article Eighteen, *supra*, is Charles G. Palmer, designated Grand Dragon, Realm of Illinois, Knights of the Ku Klux Klan, Inc. It was averred that Abraham Lincoln Klan No. 3 of Springfield, Illinois, was organized in pursuance of a charter granted by the complainant in and for the Realm of Illinois, and that one Charles G. Palmer of Chicago was the "Grand Dragon" of the "Realm of Illinois," having by appointment all of the power and privileges of the "Imperial Wizard, Knights of the Ku Klux Klan, Inc.," and that the said Abraham Lincoln Klan No. 3 had



failed to pay and was in arrears in payment of its "Imperial, Realm and Provincial tax," for a period of over three-quarters of a year and had seceded from said order; that said Abraham Lincoln Klan No. 3 had on hand funds and property properly belonging to said complainant and that due demand had been made for the same upon the issuing of the edict by the "Grand Dragon" in the following form, namely:

"OFFICIAL MANDATE, RULING,
DECREE, INSTRUCTION OR
EDICT NO. 65

"TO THE EXALTED CYCLOPS, TERRORS AND MEMBERS OF ABRAHAM LINCOLN KLAN NO. 3, LOCATED AT SPRINGFIELD, SANGAMON COUNTY, ILLINOIS;

and

"TO ALL GRAND DRAGONS, HYDRAS, GREAT TITANS, FURIES, GIANTS, KLEAGLES, KING KLEAGLES, EXALTED CYCLOPS AND TERRORS, AND CITIZENS OF THE INVISIBLE EMPIRE IN THE NAME OF OUR VALIANT AND VENERATED DEAD, I AFFECTIONATELY GREET YOU BY VIRTUE OF GOD'S UNCHANGING GRACE:

"WHEREAS, ABRAHAM LINCOLN KLAN NO. 3, in the city of Springfield, Sangamon County, Realm of Illinois, has failed to accord full respect, mannerisms, usages, and Kloranic (ritualistic regulations) and requirements of this order as same are promulgated by the Imperial Wizard;

"And to give due respect and obedience to all Imperial, Realm and Provincial decrees, edicts, mandates, rulings and instructions, its failure to pay its third and fourth quarters for the year 1923 last past, and for other good and sufficient reasons, as provided in our Constitution and Laws,

"Now, THEREFORE, I, CHAS. G. PALMER, GRAND DRAGON, REALM of ILLINOIS, KNIGHTS OF THE KU KLUX KLAN, INC., by virtue of the authority vested in me by Dr. Hiram Wesley Evans, Imperial Wizard, Knights of the Ku Klux Klan, Inc., do hereby revoke the Charter of Abraham Lincoln Klan No. 3, located at Springfield, Sangamon County, Realm of Illinois;

"AND O. W. FRIEDERICH, POST OFFICE BOX 17, PEKIN, ILLINOIS, is hereby directed to obtain from the officers and members of said

Abraham Lincoln Klan No. '3, all property and funds belonging to the Knights of the Ku Klux Klan, Inc., and the officers and members of said Klan are directed to turn the same over to the said O. W. FRIEDERICH, POST OFFICE BOX 17, PEKIN, ILLINOIS,

“Done in the Executive Chambers of the Grand Dragon, Realm of Illinois, Knights of the Ku Klux Klan, in the City of Chicago, County of Cook, and State of Illinois, on this fourth day of March A. D. 1924; and on the Dismal Day of the Weeping Week of the Frightful Month of the Year of the Klan LVII.

Faithfully yours,

In the Sacred Unfailing Bond,

Chas. G. Palmer,

GRAND DRAGON, REALM OF ILLINOIS.”

SEAL.

but that said defendants had failed and refused to pay or turn over any of said funds or property. Other acts of misconduct by the defendants, tending to bring complainant and its subordinate lodges into contempt and disrepute were charged, and it was charged that the defendants had in their possession paraphernalia, property and funds to the amount of about \$11,900, and the bill prayed an injunction and accounting.

The defendants answered the bill, substantially admitting the charter and by laws of the complainant order, but denied the right of the complainant to cancel the said charter without notice and an opportunity to defendants to be heard; denied that any notice was ever given to any of said defendants of “Edict No. 65,” and denied all charges of misconduct against the defendants or either or any of them, and denied the possession of any funds or property belonging to the complainant.

We have omitted very much matter set up in the bill and answer and have attempted to cover only the substantial and salient issues in the case. There was a replication and the

The first part of the paper discusses the importance of the study of the history of the United States. It is argued that a knowledge of the past is essential for a full understanding of the present. The author then goes on to discuss the various factors which have shaped the development of the United States, including the influence of the British, the Spanish, and the French. The paper concludes by emphasizing the need for a more comprehensive study of the history of the United States.

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cause was referred to the master to take the testimony and report the same, together with his findings and conclusions to the court. The master heard the testimony and reported the same with his findings and conclusions in the following form:

1. "That the Court has jurisdiction of the subject matter of this proceeding and of all the parties hereto, both Complainant and Defendant.

2. "That the Complainant is a corporation, not for profit organized and existing under the laws of the State of Georgia, and operated as a Fraternal Organization under and by virtue of its Charter, and in obedience to a certain Constitution and by-laws a certified copy of which is herewith filed and reference made thereto.

3. "That on or about the 10th day of June, A. D. 1923, the complainant established a subordinate State branch of its organization in the State of Illinois known as a 'Realm' which organization was in turn authorized to and did establish and maintain certain local branches throughout the State known as Klans. That the chief executive office of said 'Realm' organization is known as 'Grand Dragon,' and Chief executive officer thereof was, at all time herein referred to, Charles G. Palmer.

4. "That at some date subsequent to June 10th, A. D. 1923, a local 'Klan' was established and chartered at Springfield, Illinois, known as 'Abraham Lincoln Klan Number Three,' and its principal executive officials were at the time of the revocation hereinafter referred to as follows:—Charles S. Wanless, 'Exalted Cyclops' (or President), James H. Ashby, 'Kligrapp' (or Secretary), J. B. Watts, 'Klabee' (or Treasurer).

5. "That on the 4th day of March, A. D. 1924 by his Official edict of that date, and pursuant, to the authority vested in him by the Constitution and By-laws of the Complainant, the said Charles G. Palmer as 'Grand Dragon' revoked said charter of

'Abraham Lincoln Klan Number Three,' at Springfield, Illinois, and directed the officials and members of such 'Klan' to turn over to one O. W. Friederich, Pekin, Illinois, all property and funds belonging to Complainant.

6. "That Section 23 of Article 18 of said Constitution and By-laws of complainant provides that 'in the event the Charter of a Klan has been revoked or cancelled for any cause whatsoever, and in the event of disbandment of a Klan whether it be a chartered or provisional Klan, all moneys of that Klan in the possession of any officer or member thereof shall automatically become the actual moneys of the Imperial Treasury of this order and same must be freely and promptly turned over on demand to the properly accredited officer who is authorized by the Imperial Wizard to receive same in the name of this order; also all books, papers, manuscripts, Klorans, records, seal, Klan paraphernalia, regalia, robes, helmets, and any and all other things used by the Klan, and all articles or things appertaining to this order as may have been used by or are in the possession of any individual member thereof, 'and upon the revocation aforesaid the property and moneys of 'Abraham Lincoln Klan Number Three' automatically became the property and money of Complainant, and Complainant became entitled to the possession thereof.

7. "That Section 5, Article 19 of said Constitution and By-Laws provides among other things that 'the Kligrapp is the Secretary and recording officer of the Klan—he shall make a report through the proper channels to the proper officers not later than the 10th of the month for the calendar quarter last past—and with his reports he shall remit to said officer or officers all moneys belonging to this Order such as Imperial Tax, Realm or Provincial Tax, Klee-tokons, moneys due for supplies and any and all other moneys due and payable to said officers. He shall be the custodian of the seal of the Klan.'

8. "That Section 6, Article 19 of said Constitution and By-laws provides among other things as follows: 'The Klabee is the Treasurer of the Klan. He shall be the custodian of its funds and shall receive from the Kligrapp all moneys due to be turned over to him giving his receipt for same and keeping same apart from his personal funds and secure for the sole use of the Klan. * * *.'

9. "That Section 7, Article 19 of said Constitution and By-laws provides among other things as follows. 'The Kladd is the Conductor of the Klan and the custodian of its paraphernalia and other properties . * * *'

10. "That upon the revocation of the Charter as aforesaid it became the duty of the official known as dant James H. Ashby, as 'Kligrapp' (Secretary) and the defendant, J. B. Watts, as 'Klabee' (Treasurer) to account to the complainant for all moneys of 'Abraham Lincoln Klan Number Three' then in the possession or control of said Klan or any of its officers or members, and said last named defendants should state an account showing the disposition of all such funds; and said secretary should likewise account for the seal of said 'Klan.'

11. "That upon the revocation of the Charter aforesaid it became the duty of the official known as the 'Kladd' to account to complainant for all paraphernalia and other properties belonging to said Abraham Lincoln Klan Number Three, but it does not appear from the evidence herein who was then acting as 'Kladd' of such Klan.

12. "The Master recommends a decree in accordance with the foregoing conclusions."

To these findings, or findings and conclusions, no objections before the master or exceptions before the chancellor were made, except that the defendants James B. Watts and James H. Ashby, after reciting finding number ten, objected and excepted

as follows: "Said finding was erroneous, in that, the evidence in this cause fails to show that there was anything due complainant by the defendants at the time of the revocation of the Charter as shown by the evidence in this case; and that the evidence shows affirmatively that there were no funds or property of any kind or character in the hands of either of these defendants, belonging to complainant for which they should account, except, the seal described in the evidence which was inadvertently in their possession and which they hereby tender into Court."

The objection was overruled by the master, made an exception before the chancellor, overruled, and a decree was entered requiring the defendants James H. Ashby and J. B. Watts, as secretary and treasurer, respectively, of "Abraham Lincoln Klan No. 3," to account.

It is contended in the assignments of error on this decree that there is no evidence which would show a valid revocation of the charter of said Klan No. 3. Defendants made no such contention or objection before the master or the chancellor. On the other hand, defendants by their objection and exception to finding number ten, conceded and stated that the charter had been revoked, "as shown by the evidence," and acted upon that finding by tendering the seal to complainant in court. It has been held that on appeal from a decree finding complainant entitled to a mechanic's lien, defendant, by not filing exceptions to the master's report, will be held to have waived all objections to the claim. (*Pacyua v. Bliss*, 180 Ill. App. 351. The same case holds that without objections all conclusions of fact are waived. Findings of fact by the master not objected to, will not be reviewed upon appeal. (*Gillett v. Chicago Title and Trust Company*, 230 Ill. 419.) Questions depending on the weight of the evidence cannot be considered on appeal in the absence of objection and exception taken to the master's report, on which the decree is based.

Strayer v. Dickerson, 213 Ill. 414. Where no objections are filed to the master's report finding as to the interest in the premises of one of the parties to establish a lien upon the property by virtue of a trust deed, such interest cannot be questioned on appeal. **Marks v. The Chicago Mortgage Corporation**, 218 Ill. App. 1. The same rule is laid down in **Walker v. Chicago, Madison and Northern Railroad Co.** 199 id. 610, and **Augerer v. Southern Traction Co.** 203 id. 25.

An examination of the findings of the master indicates that each of them was a finding of a fact, except the first as to the jurisdiction of the court—about which there is no contention—and the tenth and eleventh findings. The last two findings are based upon a revocation of the charter by "Edict No. 65" of the "Grand Dragon" and it is now contended that the granting of such power to an "Imperial Wizard" or "Grand Potentate" or "Absolute Power" to exercise without notice or a hearing, is un-American, unreasonable and void. No such question was raised before the master or before the court, and when "Edict No. 65" was offered and admitted in evidence the only objection made was that "there was no evidence" of its having been sent to or received by Abraham Lincoln Klan No. 3." It was accepted upon the trial as a legal and lawful exercise of power on the part of the ruling authorities and the evidence was overwhelming that the edict was received by and acted upon by the powers controlling Klan No. 3.

The fifth finding of fact by the master to which no objection or exception was made, was that the Grand Dragon cancelled and revoked the charter, and the defendants, by their exception to finding ten, so recognized the fact and are now estopped to urge the assignment of error. The contention, however, in its broadest sense is, that there can not be a corporation sole for charity. The mere statement of the contention is its refutation. All things are not necessarily un-American merely because they do not suit

our individual taste or cater to our advantage. What was said by the court in **Gross Loge, etc. v. Maria Brausch**, 256 Ill. 185, is applicable to this case. In corporations not for pecuniary profit, the charter and by laws constitute a contract between the members with which courts will not interfere.

Other assignments of error were made, one being that the charter of said Klan No. 3 was never revoked, when all of the oral testimony before the master and court is conclusive that the charter was revoked and that defendants acted upon the understanding that they were no longer members of complainant corporation.

Shortly prior to March 5, 1924, the "Grand Dragon" of the "Realm" by executive order removed the "Great Titan" of "Province No. 2," and the members of Abraham Lincoln Klan No. 3" took official action at the exact time they received notice of the cancellation of their charter, passing the following resolution:

"WHEREAS: The Great Titan of Province No. 2, Realm of Illinois has been removed by the Grand Dragon of Illinois, for the reason that he refused to be made a party to the political betrayal of Klansmen of this State, and

"WHEREAS: Abraham Lincoln Klan No. 3, Realm of Illinois, has withdrawn from the National Organization until such time as the Imperial Palace shall take the necessary steps toward the removal of Charles G. Palmer as Grand Dragon of Illinois:"

Whether the defendants were willing to acknowledge that their charter had been cancelled or personally wished to nullify it by secession from the order, would appear to be a distinction without any material difference.

Klan No. 3 of Springfield claimed to take great offense at a letter sent out on February 21, 1924, from the office of the Great Titan (personally written by Palmer) in the following form:

"IMPERIAL PALACE OF INVISIBLE EMPIRE, KNIGHTS OF THE KU KLUX KLAN, INCORPORATED, ATLANTA, GEORGIA, REALM OF ILLINOIS.

"Office of the GREAT TITAN PROVINCE NO.
5, Phone Randolph 3557-3361, P. O. Box 811, Chicago,
Illinois, February 21st, 1924.

G. T. No. 2,
Springfield, Ill.

Faithful and Esteemed Klansman:

"The political Activities committee of the Illinois
Better Government League, is of the opinion that
Judge Jenkins of Springfield is to be preferred over
Justice Dunn, as a candidate in the Third Judicial
District for Supreme Court Justice.

"As I understand the matter Judge Jenkins has
pledged himself to them and in line with the general
political program about to be worked out he is con-
sidered the logical candidate.

"It is their hope therefore that you will be able
to do all you can to help Judge Jenkins to secure the
support of all concerned.

"It is absolutely useless for the Political Activi-
ties committee of the League to concentrate upon any
particular endeavor and then have their recommen-
dations ignored. While the rank and file cannot be
told every little in and out of the situation, those of
us who are broad enough to take in their comprehen-
sive program at a glance should be willing to co-oper-
ate with them and accept their recommendations as
final. At least they have given much more time and
thought to the qualifications of the respective candi-
dates than the individual voter has, and that taken
in conjunction with the additional consideration of
promises made by the candidates themselves to give
recognition later on, is suffice for me as an individual.

Faithfully yours,

"In the Sacred Unfailing Bond."

And "Klan No. 3" now represent that they were op-
posed to the order interfering with politics in any
manner. Just why they waited from February 21st to
March 5th, 1924, to pass the resolution of withdrawal

is not made clear.

It is contended that it is not shown that the complainant Order had authority to do business in the State of Illinois. This is a matter that should have been set up by defendants' answer and shown by the proof. (*Holmes v. Standard Oil Co.*, 183 Ill. 70; *Delta Bag Co. v. Kearns Co.*, 160 Ill. App. 93; *Delta Bag Co. v. Kearns Co.* 253 Ill. 365.) Even if it should be conceded that complainant was amenable to the Foreign Corporation Act and acting in violation thereof, defendants (except the bank) were all members of the Order and are estopped to raise that question. The charter and by laws of complainant operate as a contract between the corporation and its members, who became members in reliance upon them, and the contract, like any other one, is not to be abrogated or set aside by construction on the ground that the performance of it would be inconvenient or unfavorable to either one of the contracting parties. (14 *Corpus Juris*, 346; *Cratty v. Peoria Law Library Ass'n.*, 219 Ill. 523; *Supreme Lodge K. of P. v. Kutscher*, 179 id. 344; *Mandel v. Swan Land and Cattle Co.*, 51 Ill. App. 209.)

We find no error in the decree of July 8, 1925, that would warrant a reversal.

On the proceedings before the master upon the accounting, it was shown that the defendants James H. Ashby, as former secretary, and J. B. Watts, as former treasurer, were responsible for the moneys of the Order, which had been deposited in the First National Bank of Springfield prior to March 5, 1924, to the amount of \$10,854.08, and which were carried in the bank on an account under the name of "J. B. Watts, Sec'y." At the opening of the bank on the morning of March 5, 1924, four checks were cashed, said checks having been issued by the defendants Ashby and Watts, one pretending to bear date March 1, 1924, payable to the order of said James H. Ashby for the sum of \$1784; one pretending to bear date February 29, 1924, payable to the order of Chas. S. Wanless for the sum of

\$1175; one pretending to bear date February 27, 1924, payable to the order of J. W. Dugger for the sum of \$5000; and the fourth pretending to bear date February 24, 1924, payable to the order of E. M. Coombs for the sum of \$2360. It is to be noticed that these four checks are all dated in a series two days apart on and prior to March 1, 1924. All except Coombs had been officers in Klan No. 3 and were originally made defendants to the bill of complaint. These checks were issued and pretended vouchers paid without any vote of the "Klan" as required by the constitution of the Order. There was left in the bank the sum of \$535.08 under the control of Defendant Watts. None of these parties to whom checks were issued made any accounting of how the funds were used for the benefit of the order or "Klan No. 3." Ashby was in the printing business and testified that the check to him was in payment for printing, but no bill or items were presented and Ashby was contradicted and impeached by his partner and the records of his business. Wanless and Dugger gave no explanation of the use of the funds checked out to them. The testimony of Coombs is interesting and given under circumstances apparently free from any personal interest and very much against the interest of his employer. Coombs testifies that there was a meeting of certain Klansmen in the Hall of the Order on March 4, 1924; that Dugger, Wanless, Ashby, Day and others were present; that the question of the cancellation of the charter and how to preserve the funds in the bank was discussed; that at that meeting on March 4, 1924, Ashby handed him the check for \$2360, and that he talked with Wanless about cashing it the minute the bank was open in the morning, and Wanless agreed to meet him at the bank at nine o'clock in the morning; that he met Wanless at the bank the next morning and Wanless identified him and indorsed the check, and that he drew the money upon it and walked down the street about two-thirds of a block, as he was directed to do by Wanless.

and met Watts and turned the money over to Watts just as he had received it. Coombs testifies that Dugger was at the bank on the same morning, March 5, 1924, cashing his check. The voucher made out in Coombs' behalf pretended to be for the services of forty-nine precinct workers in the spring election, who were hired by Coombs. He testifies that he never employed any precinct workers or had anything to do with the election, and there is no testimony that he had. There is other testimony corroborating Coombs as to the purpose of the meeting on March 4th, and tending to show that the bills were fictitious. Witnesses testified to statements made by Watts, the Treasurer, as to the amount of the funds in the bank, which were about eleven thousand dollars up to and on March 5, 1924. There was conflict in the testimony along these lines, but the fact that all four of these checks were cashed within a few minutes of each other on the morning of March 5th, 1924, and that Wanless was at the bank, as shown by his signature on the Coombs check, is very strongly corroborative that the checks had not been issued previously,—one of them ten days—were colorable and the vouchers fictitious. The fund in the bank was about the amount that "Abraham Lincoln Klan No. 3" was in arrears under the by-laws to the "Imperial Realm." We are satisfied that the preponderance of the testimony in this case shows that each and all of said checks were fictitious and that the funds did not pass out of the hands of Defendants Ashby and Watts.

Section six of article nineteen of the Constitution provides:

"Klabee is the treasurer of the Klan. He shall be the custodian of its funds, and shall receive from the Kligrapp all monies due to be turned over to him, giving his receipt for same, and keep same apart from his personal funds, and secure for the sole use of the Klan. He shall keep an accurate account of all monies received by him, and pay same out only on order of the Klan, signed

by Exalted Cyclops and the Kligrapp, except the monies due by the Klan to the Imperial Realm and province officers, which monies do not require action of the Klan, and make a faithful record of such disbursements."

No offer of proof of any kind is made to show that the "Klan No. 3" ever authorized the payment of any such vouchers.

It has been held that where a defendant is an accounting party, as one occupying a fiduciary relation, the burden of proof is on him to show the performance of his trust, and one who is liable to render an accounting has the burden of proving allowances of credit which he may claim. (Corpus Juris, Vol. 1, pages 642-3, section 129.)

The master in chancery took the testimony and saw and heard the witnesses and made his report. There was some conflict in the testimony, but we cannot say that its weight is clearly and palably against the decree of the court. In **Schultz v. Schultz**, 274 Ill. 349, in a similar case the court held: "The testimony is very conflicting, but we cannot say that its weight is clearly and palably against the decree of the court. In such situation we would not be justified in reversing the decree on the evidence. **Treloar v. Hamilton**, 225 Ill. 102, and cases cited; **Miltimore v. Ferry**, 171 id. 219; **Maratta v. Anderson**, 172 id. 377."

Finding no error in the record, the decree of the Circuit Court of Sangamon County is affirmed.

Affirmed.

Appellants and plaintiffs in error, upon petition for rehearing contend that the revocation of the charter of Abraham Lincoln Klan No. 3 involved a question of law, and that the Imperial Wizard was powerless to declare a forfeiture without giving "the other party to the contract" opportunity to be heard. It is further contended that property rights were involved in the forfeiture, and that the rules and constitution of the Grand Lodge can not deprive the courts of jurisdiction to determine property rights. It is contended that the rules and constitution of the parent organization are unreasonable and void; that the findings of the Master involved questions of law to which appellants and plaintiffs in error were not bound to except, and that this court has not passed upon these questions.

It is conceded in the proofs that appellants and Abraham Lincoln Klan No. 3 violated the rules and constitution of the order in failing and refusing to pay dues, and that the rules of the order, in such event, provided for forfeiture. The preponderance of the proof further shows that Abraham Lincoln Klan No. 3 had seceded from the Order. This Klan organization was incorporated under the law, not for pecuniary profit, and as to the reasonableness of its laws, rules and constitution courts are not concerned and will not attempt a determination. (**Christian Church v. Church of Christ**, 219 Ill. 515.) And when appellants seceded from the parent organization they abandoned all interest in the property which belonged to the Ku Klux Klan. (**Christian Church v. Church of Christ**, *supra*.)

The contention here raised was not raised in the lower court. Appellants brought the seal of the subordinate corporation into court and delivered it up and the cause was tried on the issue

that appellants had no moneys or funds belonging to appellee. The facts warranting a cancellation of the charter, under the rules and constitution are conceded, but appellants insist that there is no power to cancel, except upon notice and a hearing. The cases cited to support appellants' contention are all from other states, and, so far as we have examined, all of them involve a property right, based upon a policy of insurance upon which the parent organization is bound, or a special trust fund which the subordinate lodge was incorporated to administer. (*Watchell v. Widows and Orphans Society*, 84 New York, 28; *Ludowski v. Benevolent Society*, 29 Mo. App. 337; *Grand Court Foresters v. Court Covour* No. 133—83 N. J. Eq. 343.) In *Austin v. Searing*, 16 N. Y. (Court of Appeals), 112, the question apparently arose nearly one hundred years ago over the right of the subordinate body to insist upon a reinstatement that was provided for in the by laws. No such questions are raised in the case at bar. No purpose of appellee's existence is suggested, except to maintain a principle. Whether such principle is religious, economic or patriotic, is not for courts to determine and would make no material difference if determined. The government of appellee order, as shown by the constitution and its by laws, is autocratic and sole, but its actions and conduct are not for that reason unreasonable and void. It is held in *Corpus Juris*, vol. 14, page 72:

“The Legislature has power, in the absence of constitutional restrictions, to permit one person, or his successor, to exercise all the corporate powers, and to make his acts, when acting upon the subject matter of the corporation, and within its sphere of action and grant of powers, the acts of the corporation. *Penobscot Boom Corporation v. Lamson*, 16 Maine, 224, 33 Am. D. 656.”

In this State religious corporations are based upon the usages and customs of the particular denomination or synod seeking corporate power, and the exercise of that power and the manner thereof frequently is a part of the religious belief. That it is

exercised autocratically or by a corporation sole, has never been held to be against the public policy of this state. Neither the Legislature by enactment nor the courts by construction in this State have ever held that social or religious affairs of the people should be free or equal, and the court held in **Christian Church v. Church of Christ**, *supra*, on page 512: "It is not, therefore, within the province of this court to pronounce judgment upon the doctrines taught by Alexander Campbell and believed and practiced by his followers, or to determine which faction of the Sand Creek congregation, in their practices in their church congregation, from an ecclesiastical standpoint, is correct, as the court have no concern with the questions whether a religious congregation is progressive or conservative; whether a musical instrument shall be present or absent during church services; whether the preacher shall be selected from the congregation or shall be a person employed by the congregation for a stated time at a stated salary; whether missionary societies and Sunday school shall have separate organizations from the church congregations or not, or whether the funds necessary for the support of the church shall be contributed wholly by its members or raised in part by fairs and festivals. All those questions, and kindred questions, must be left to the determination of the church congregation."

Neither is appellee, incorporated in another state, prohibited from bringing suit in this State, under the corporation act passed in 1919 and the amendments thereto. (**American Guaranty Co. v. State Bank of East Lynn**, 244 Ill. App. 16.)

In conclusion, appellants have no property right involved in the cancellation of the charter of Abraham Lincoln Klan No. 3. (**Pitcher v. Board of Trade**, 121 Ill. 412.) Appellee is a corporation organized under and by virtue of a decree of a court of general jurisdiction in the State of Georgia. Appellants became members of this association by agreeing to abide by and conform to

all of the laws, rules and regulations of the order. The laws and rules of which they complain are of their own choosing, and courts are powerless to aid them. (**Fisher v. Board of Trade**, 80 Ill. 85; **Baxter v. Board**, 83 Ill. 146; **Sturges v. Board of Trade**, 86 Ill. 441.)

The petition for a rehearing is denied.

6739a

General No. 8125

249 I.A. 658³
Agenda No. 4

OCTOBER TERM, A. D. 1927

Frederick I. Judson, Plaintiff in error,
vs.

First Trust & Savings Bank of Springfield, Illinois,
and L. F. McCullough, Defendants in Error.

Writ of Error to Circuit Court of Sangamon County
and Other Counties.

SHURTLEFF, P. J.

This case was before this court at a former term (See 238 Ill. App. Court Reports, page 531), at which time this court reversed the decree of the lower court and remanded the cause with directions to vacate an order dismissing said cause upon the motion of plaintiff in error and to state an account. Plaintiff in error argues only one assignment of error and states: "The only question involved is the right of the complainant to dismiss his bill of complaint." This was one of the main questions passed upon on the former appeal, and this court is bound by its holding in the opinion then filed in this cause. **Zerulla v. Supreme Lodge**, 223 Ill. 520; **Anderson v. Fletcher**, 228 Ill. App. 372; **Lemarty v. Popp**, 175 Ill. App. 544.

On the former hearing this cause was prosecuted in behalf of plaintiff in error by a guardian *ad litem*, and the petition for a writ of error upon this hearing is presented by plaintiff in error in his own proper person with nothing to show that plaintiff in error has ever been restored to reason, or that the order appointing a guardian *ad litem* has ever been vacated or in any manner modified. The abstract presented in addition fails to show or present any of the evidence and testimony, master's report or decree of the lower court, portions of which, in any event, would

be necessary upon which to assign error upon the record. The "decree" mentioned in the abstract, for anything that otherwise appears in said contract, may be the dismissal that plaintiff in error is contending for. No judgment or decree for any costs against plaintiff in error is even shown. The abstract does not conform to the rules of this court. The court will not look to the record for the purpose of reversing a decree or judgment, but an abstract of record complying with the rules of this court should be filed. (**Inman v. Miller** 234 Ill. 356; **Hickox v. City of Springfield**, 208 Ill. 28; **Kellogg Newspaper Co. v. Building Assn.**, 210 Ill. 419; **Patterson v. Northern Trust Co.**, 238 Ill. 604; **City of Elgin v. Nofs**, 113 Ill. App. 620; **Johnson v. Hartman**, 119 Ill. App. 206; **Zinkl v. Aluminum Co. of America**, 169 Ill. App. 194; **Chicago Record Herald Co. v. Fred Bender Stove Co.**, 207 Ill. App. 152.)

The defendant in error is not required to present an additional abstract. The abstract will be held insufficient. **Hickox v. City of Springfield**, 208 Ill. 30.

For the reasons stated, the decree of the Circuit Court of Sangamon County is affirmed.

Affirmed.

6740a

249 I.A. 6584

General No. 8129

Agenda No. 7

OCTOBER TERM, A. D. 1927

W. Z. Wright, George L. Wright, Alevia M. Kes-
singer, Defendants in Error,

vs.

State Bank of Herrick, Plaintiff in Error.

Error of the Circuit Court of Shelby County.

SHURTLEFF, P. J.

We shall refer to the parties as plaintiffs and defendant, respectively, as the cause was brought in the Circuit Court of Shelby County.

Plaintiffs brought suit in trover to recover the value of a certificate of deposit in defendant bank of the face value of two thousand dollars. There was judgment for plaintiffs in the court below for the sum of two thousand dollars and defendant has sued out a writ of error to reverse that judgment. The certificate in question was issued by defendant bank to one John H. Wright and by him, for a valuable consideration, assigned to the plaintiffs in equal parts, payable at the death of said John H. Wright. A jury was waived and the cause tried by the court. We adopt plaintiffs' statement of the case as practically and substantially supported by the proofs.

The undisputed testimony shows that plaintiffs were, at the time of the issuance of said certificate, the only children of said John H. Wright, and subsequently, upon the death of said John H. Wright, his only heirs at law. The testimony of plaintiffs is to the effect that on or about January 24, 1923, the said father had a design and purpose in his mind to divide his estate among said three children. He executed and delivered to them deeds to certain real estate; assigned and delivered certain promissory notes owned by him and gave them to his said children, and as to



6740a

249 I.A. 658⁴

General No. 8129

Agenda No. 7

OCTOBER TERM, A. D. 1927

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The undisputed testimony shows that plaintiffs were, at the time of the issuance of said certificate, the only children of said John H. Wright, and subsequently, upon the death of said John H. Wright, his only heirs at law. The testimony of plaintiffs is to the effect that on or about January 24, 1923, the said father had a design and purpose in his mind to divide his estate among said three children. He executed and delivered to them deeds to certain real estate; assigned and delivered certain promissory notes owned by him and gave them to his said children, and as to

the particular certificate in question the testimony of plaintiff is that he assigned that instrument on or about January 24, 1923, and gave it into the safe keeping of defendant as the property of his children. The contract of indorsement appearing on the back of said certificate under date of January 24, 1923, reserves the interest to said John H. Wright.

Witness for defendant admits the writing of the assignment by the cashier of said Bank; admits the delivery of said certificate to said Bank as custodian; admits the gift of said certificate to said plaintiffs, but upon the condition orally expressed, that is, that before the preparation and signing of the same, John H. Wright said that in case he died before the maturity of said certificate then the principal should be the property of his said three children, but if he did not die before the maturity of said certificate, then it should remain the property of said John H. Wright. Witness for defendant testified that he attempted to write the assignment according to the expressed wish and order of said John H. Wright.

The undisputed testimony shows that after the foregoing transactions, some time in July following, at the request of said John H. Wright, all three of said children met him in his home at Herrick, Illinois; that he said he was not quite satisfied with former arrangements; that upon his request and order, said Bank by its cashier, delivered to said John H. Wright at his home a number of notes, papers, etc., including the said certificate. The testimony of plaintiffs shows that said certificate was then and there delivered to said W. Z. Wright, together with all the promissory notes, and that all of said property was given to said three plaintiffs in equal parts, and then and there delivered to said W. Z. Wright. Witness for defendant recalls and admits the delivery of said papers, including said certificate, but does not recall that he did more than hand the container envelope to said John H. Wright. He says the certificate came again into the possession and custody of said Bank, but he has no knowledge or recollection

whatever as to how or when it returned. Plaintiff W. Z. Wright says he sent it to said Bank for the payment of interest and the issuance of a new certificate at maturity of the one in question. Witness for defendant says he may have received communications from said W. Z. Wright other than those produced on the trial.

The witness Bender positively testifies on direct examination that he delivered the certificate to John H. Wright at his home in Herrick in July following the date of the certificate. He admits the same thing in his cross-examination, and in his letter to W. Z. Wright almost a year afterwards he says in so many words, "We still have the certificate of deposit and note that you mailed us here." From the evidence it clearly appears that the certificate passed out of the possession of said Bank and out of the possession of said John H. Wright and was returned by plaintiffs to said Bank for the purpose of renewal and the payment of interest thereon to said John H. Wright in accordance with the endorsement, because in Exhibit "B" the cashier of said Bank says, "I have paid the interest to Uncle John on this Time Certificate but that was all. This was in accordance with the endorsement on the back of the certificate." This statement was made over the signature of said cashier after said certificate had matured.

On March 15, 1924, after the maturity of said certificate, John H. Wright a second time endorsed said certificate to two of his grandchildren after it had been sent to the Bank without the endorsement of any one of the plaintiffs and against the positive written instructions of the plaintiffs not to deliver said certificate, but to pay interest on same and issue a new certificate in lieu thereof. The evidence shows that the grandson of John H. Wright went to Herrick to investigate the holdings of his grandfather, and then returned to the Bank with the power of attorney executed by John H. Wright, which power of attorney gave no right over the certificate in question, and upon presentation of the power of attorney the said

Bank turned over to said grandson, Lane E. Wright, the said certificate together with other property of John H. Wright, and said John H. Wright and Lane E. Wright under instructions from John H. Wright, erased, cancelled out, and as they say, nullified the endorsement to plaintiffs, and at the same time said John H. Wright signed a second endorsement of said certificate, making said Lane E. Wright and Ione Elzea endorsees, and on presentation of said certificate the face of the same was paid to the second set of endorsees.

Plaintiffs contend that there was a valid transfer of said certificate to them by the endorsement of the same, and further contend that there was a valid, irrevocable gift of the same to plaintiffs in July following the issuance of said certificate, and that the defendant, with full knowledge of all the rights existing between the parties and against the positive instructions of plaintiffs, knowingly and wrongfully disposed of said certificate and deprived plaintiffs of their legal rights in same; that there was an unlawful conversion of said property and that suit in trover is the proper remedy. The minutes of the court show a motion was made to amend the praecipe and summons, and that the same was amended, the praecipe and summons having been in *assumpsit*, and the declaration filed in *trover*.

Plaintiffs further contend that the testimony of Witness Bender as to oral conversations prior to the endorsement of said certificate to plaintiffs is incompetent testimony and should have no bearing on the case, but even if such testimony is competent testimony, that there was a gift of said property completed by delivery in July, 1923, at which time the title and possession both passed to plaintiffs.

The endorsement made upon said certificate by John H. Wright was in the following form, upon the back thereof:

“Herrick, Ill. January 24, 1923.

“For value received I hereby assign the within certificate to

W. Z. Wright, Geo. L. Wright and Alevia Kessinger, same to be paid to them in equal parts at my death. The interest is reserved by me.'

John H. Wright."

"Witnessed by

"W. Z. Wright

"Geo. L. Wright."

"Paid Apr. 7, 1924,

"State Bank of Herrick

"Herrick, Ills.

"Int. Pd. Jan. 29, 1924, \$100.00 to J. H. W."

Oral proof was offered by defendant tending to show that said assignment was to be void in case the assignor outlived the term of the instrument. The certificate of deposit was, in legal effect, a negotiable promissory note in which the defendant bank is maker and J. H. Wright is payee. **Kavanaugh v. Bank of America**, 239 Ill. 404; **Bank of Peru v. Farnsworth**, 18 id, 565. Where the parties reduce their previous negotiations to a written contract, such contract is the final consummation of their negotiations and exact expression of their purpose, and all matters constituting such negotiations are merged therein. **Graham v. Sadlier**, 165 Ill. 95; **Wilford v. Bliss**, 174 Ill. App. 28; **Telluride Power Co. v. Crane Co.**, 208 Ill. 226.

The testimony of the cashier tending to vary the terms of the contract in a court of law, was incompetent and was not considered by the court below. This also disposes of the assignment of error that the declaration did not state a cause of action. The testimony of Bender, defendant's cashier, is further uncertain and ambiguous as to just what did take place, but he states that he did write the assignment as near as he could as John H. Wright gave it to him. It is contended that the promise to pay the face of the instrument and the promise to pay the interest are not severable contracts. **Scott v. Liddell**, 98 Ga. 24, cited in Vol. 8, Corpus Juris, 343, sec. 519, is authority that they are severable contracts.

It has been held that any unauthorized act by which an owner is deprived of his property permanently or indefinitely or the exercise of dominion over property inconsistent with the rights of the owner, is a conversion—**Knight v. Seney**, 290 Ill. 11—and that a suit for the conversion of property must be brought by the persons entitled to the possession of the same at the time of the conversion. **Milligan v. McKinley**, 18 Ill. App. 611. It is further held that joint owners of the chattel may unite in a suit for its conversion without showing the exact interest of each owner therein. 38 Cyc, 2052.

The real issue in this case is, whether the certificate really passed out of the possession of John H. Wright, the payee, and into the hands or possession of plaintiffs, and whether defendant converted the same. The testimony of W. Z. Wright and Alevia Kessinger is conclusive that in July, 1923, their father, John H. Wright, passed the certificate to his son, W. Z. Wright, to hold for the benefit of his three children, plaintiffs, and that W. Z. Wright was in the possession of the certificate until the month of January, 1924, when he sent it to defendant Bank to collect the interest and renew the certificate. The testimony is uncontradicted that the defendant Bank retained the certificate and upon April 7, 1924, was a party to wrongfully erasing the original signature to the assignment, paid the certificate to strangers to the instrument and cancelled the instrument.

Some complaint is made that the praecipe and summons are in assumpsit, the declaration in trover, and the judgment in assumpsit. Plaintiffs contend that the judge's minutes show that they had leave to amend the praecipe and summons and that such amendments were made. This is not shown by the abstract of record. However, defendant pleaded to the declaration in trover and the cause was tried upon that issue, without objection, and it is to be presumed that the amendments were made. It is not pointed out how the judgment in assumpsit is any more obnoxious to defendant than a judgment in

trover would be, otherwise the judgment could be corrected in this court. No findings of law or fact were submitted to the court below. No error is pointed out that we deem of sufficient importance to reverse the judgment.

The judgment of the Circuit Court of Shelby County is therefore affirmed.

Affirmed.

6741a
249 I.A. 658⁵

General No. 8133

Agenda No. 10

OCTOBER TERM, A. D. 1927

Edward Gross, Defendant in Error,
vs.

William W. Wheelock and William G. Bierd, Receiv-
ers, Chicago & Alton Railroad Co., Plaintiffs in Error.

Error to Circuit Court of Pike County.

SHURTLEFF, P. J.

Defendant in error brought his suit in the Pike County Circuit Court against plaintiffs in error to recover damages for personal injuries sustained by him in being pushed and kicked off from a car of a moving freight train on the Chicago & Alton Railroad, which was operated by plaintiffs in error, through their servants, at Granite City on September 4, 1923. This cause has been before this court at a former term and an opinion rendered (**Edward Gross, Defendant in Error, v. William W. Wheelock and William G. Bierd, Receivers, Chicago & Alton Railroad Co., Plaintiffs in Error, March 8, 1926,**) in which a verdict and judgment of the Circuit Court of Pike County in plaintiff in error's behalf was reversed and the cause remanded on the sole ground that the verdict and judgment were against the manifest weight of the evidence. The cause has been retried, with the result that defendant in error secured a verdict in the sum of fifteen thousand dollars against plaintiffs in error. There was a motion for a new trial, which was overruled. The court entered judgment upon the verdict and the cause has been brought to this court by writ of error for review.

In the former suit this court made substantially the following statement of facts from the record, upon which the opinion in that cause was based: "This action was brought in the Circuit Court of Pike County by Edward Gross, defendant in error, to recover

damages for injuries sustained while attempting to board a moving freight train of the Chicago & Alton Railroad at Granite City, to "steal" a ride to Alton. It is clear that the defendant in error, in making the attempt to board the train was a trespasser; but the declaration alleges that while the defendant in error was making the attempt to board the train, one of the servants of the plaintiffs in error, operating the road as Receivers, negligently ordered the defendant in error to get off the train; and unlawfully, wantonly and wilfully struck the defendant in error, and shoved and kicked him off of the freight car, which he was trying to board; and thereby caused him to fall under the moving train, whereby he was injured. A trial of the case resulted in a verdict and judgment for the defendant in error, fixing his damages at \$13,555. This appeal is prosecuted from the judgment.

The defendant in error rested his case on the testimony of one witness, Peter Dailey, who was his companion in the attempted freight train ride from Granite City to Alton. This witness testified that he and the defendant in error had decided to catch the train; that it was arranged that the defendant in error should catch it first; that the train came along going north, and traveling at the rate of about fifteen miles per hour; there were about forty cars in the train, with a caboose on the rear end; that the defendant in error attempted to get on the third car from the caboose—a box car; and that he got on the front end of the car, on an iron ladder; that there was a coal car immediately in front of the box car; that the sides of the coal car were about half as high as the box car; and that as the train came along, the defendant in error ran with it, grabbed hold of the ladder, and jumped into the stirrup; that after the defendant in error got up on the ladder, the witness saw a man (whom he afterwards testified was the conductor) standing between the box car and the coal car; and that this man made an attempt to get over to the defendant in error, and that as he did,

the witness ran with the train to see what the man was going to do with the defendant in error; that the man said something to the defendant in error, but the witness did not know what he said; that he ran with the train up on top of a little bank just to the east of the ties; that there was a level foot path there; that the man was on top of the coal car, and stepped off of it; and that the witness said to the man—"hey, what in the H— are you trying to do?" and the man came down with his foot on the defendant in error's hand, and hit him in the face with his fist; and the defendant in error fell; that he hit the bank, and as he did, he flew or rolled against an oil box; and the oil box struck him in the back; that when the defendant in error was kicked, witness made a grab for him, but did not get hold of him, but missed him; that witness kept on running, making grabs at the defendant in error—then the oil box got him in the back and as it did, some way his foot got under the wheels.

Dailey's testimony to the effect that the defendant in error was injured by being kicked off or knocked off of the train by Howard Hensley, the conductor on the train, was at variance with the testimony of at least six persons, who observed the occurrence, and who were called as witnesses for the plaintiffs in error"

On the retrial of the cause the testimony of the witnesses was substantially the same. Some variations from the proofs on the former trial were pointed out. Defendant in error was able to and did testify in his own behalf, corroborating the statement made by the witness Peter Dailey, and plaintiffs in error did not produce the testimony of one Cow herd, who was a witness in behalf of plaintiff in error upon the former trial.

Various assignments of error are made by plaintiffs in error, all of which we shall discuss. The first one is that the verdict and judgment are against the manifest weight of the evidence. While the testimony and proofs upon the later trial are in large measure the same as upon the first trial, some differences are pointed out and we shall consider the proofs in the sense that we are not

bound by our former opinion as to the weight of the evidence. We submit the full proofs of defendant in error and the witness Dailey, in his behalf, as to the liability of plaintiffs in error as we glean the same from the respective abstracts.

The Chicago and Alton Railroad runs north and south through Granite City. Nineteenth and Twentieth Streets run east and west through the city, Nineteenth to the south and Twentieth to the north. Twentieth Street runs just north of the Chicago & Alton depot. Immediately west of the depot is the Chicago & Alton main line, then comes a team track, then the tracks of the C. P. & St. L. Railway, then the terminal railroad track, and finally a foundry switch. On the east side of the depot the first track is the "Big Four" main line, then the tracks of the Wabash railroad and the terminal, respectively. There is a level platform at the depot, which spreads out south of the depot, but does not extend to Nineteenth Street. It was about seven hundred feet between Nineteenth and Twentieth Streets and the train of plaintiff in error ran from four to six hundred feet after the injury complained of before it came to a full stop.

Defendant in error testified: "I found a Chicago & Alton freight train passing, going north on the first track west of the depot, and Dailey and I agreed to catch that train for Alton. The train was passing over Nineteenth Street at that time at about fifteen miles an hour. I got onto the train on the south side of the street and Dailey was on the north side. As the train was passing I caught one of the cars. There were about thirty-five or forty cars in the train and I caught a box car which was the third car from the caboose. I caught it on the ladder at the front end and got onto the ladder, put my foot in the stirrup and I was on. My hands were up about a foot of my eyes and the train was moving about fifteen miles an hour. I was just going up a step and I noticed a man between the coal car, in front of the box car, and the box car. The top of the coal car was about half as high as the box

car. The man was on the end of the coal car about a foot from the center of the car and next to the box car. He came toward me and said 'get the hell off of this train!' and just then he stepped on my hands and kicked me in the side and I fell off the train. He stepped on my knuckles and then come down on me at the side at the same time and it knocked me out. I fell back off of the car and I do not know what occurred after that time."

On cross-examination defendant in error testified: "At the time I saw him I had gotten into the stirrup of the box car and was holding onto the ladder of the box car with my hands about on a level with my eyes. When I got on and started going up the steps, just at that instant he came over and he kicked or stamped on the upper part of my hands as they were holding onto the iron ladder. I had mounted to the stirrup—the ladder ran up the side of the car. He stepped on my hands first and then brought his foot back and kicked me in the side. I had mounted to the stirrup and was preparing to climb the ladder. That would put me and my hands on the east side of the box car, the man had one foot over on the box car and his hands over there too and he was just coming over toward me when I seen him. He had one foot on the ladder of the box car which is on the front of the car and just as I seen him he swung his foot over from the coal car to the box car. He was up higher than I was. When he spoke to me he had left the coal car and was climbing up the ladder on the north end of the box car and had gotten above me. His foot was about even with my waist when I noticed him and he stepped on my hands and kicked me in the side."

The witness Dailey testified: "Walking west on Nineteenth Street, just as we got to the track we saw a freight train coming north traveling about fifteen miles an hour and we said we would take the freight to Alton instead of waiting for the passenger train. We were on the north side of Nineteenth street when the train came along, and Gross went over on the south side of Nineteenth Street

and made one try and got on the train at the third car from the caboose which was a box car. He got on the front end on the east side of the car. He took a little run,—he had his hands on the ladder and put his foot in the stirrup and he was on before he passed me. As he passed, my attention was attracted by a man between the box car and the coal car. I seen him as I was about in the middle of Nineteenth Street. I seen a man coming toward him between the box and coal cars. I started to run along with the train and I seen him come over to the freight car and stamped on him and I said, “What the hell are you trying to do.” Eddie flew backwards and hit the ground. I was about five feet east of his and as he fell and hit the edge of a little embankment and flew back against the oil box of the car which hit him in the back and swung him. His head hit the ties and his leg went under the wheel of the car and I pulled him out a little ways, just enough so the train passed on. I got up and ran after the train trying to get them to stop. The little embankment is shown in Plaintiff’s Exhibit A. As I ran after the train trying to stop it, the same fellow that kicked Gross off the train came out of the rear end of the caboose and bent over and pulled something—the train went ‘shh’—and she come to a stop.”

Dailey further testified that it was about 135 feet north of Nineteenth Street where defendant in error was picked up by him from under the train, and about 110 feet north of Nineteenth Street where he was kicked off from the train. “The car that Gross got on was the third from the caboose, not counting the caboose and it was a box car. The car next in front was a coal car and the sideboards of it were four and one-half or five feet from the floor. As the car came to me I was on the north side of Nineteenth Street and started to run with the car. I was so I could see the man. I seen him before Gross got on the car. The man was between the box car and the coal car on the outside on a little platform about one and one-half feet from the top of the

coal car. I seen him getting up on this platform. I could see his head and shoulders. He was on the platform where the brake wheel is and started coming over to where Ed was standing on the box car. There was about three feet between the two cars. I saw him step from the top of this here coal car and make a grab on the box car in front; and the man swung around from the end of the coal car and then shoved his foot back against the coal car over to the end of the box car, and at the time he made the assault on Gross he had one foot on the coal car and one on the box car. No foot was on the coal car when he kicked at him. The position he was in was he got his right foot on the ladder and the left foot brought over and down with it. He came over the top of the coal car from this platform. He bent down and grabbed one of these ladders and came down with his left foot and his hand at the same time, kicked and shoved at the same time and Eddie went backwards. He had his right foot on the ladder that was on the north end of the box car and his right hand on a rung of that ladder and he shoved and kicked him off the train. In so doing his right foot was on the north end of the box car and he reached around with his left foot to the east side of the box car and kicked Eddie's hand."

Dailey further testified that Gross' knuckles were all bleeding after he was kicked from the car, and regarding the tops of his hands: "I thought they were broken when I seen them."

Dr. Wolfert testified for defendant in error that in the area of the knuckles back on to the hands the skin was torn off and was black and blue.

Defendant in error and Dailey both identified the man who assaulted defendant in error as the witness Howard Hensley, conductor on the train, and Dailey identified the same person as the one who came out of the rear door of the caboose and applied the brake to stop the train. When the train came to a stop the caboose had just cleared Twentieth Street. If the train had

continued its speed at the rate of fifteen miles per hour, it would have been one minute traveling from Nineteenth to Twentieth Streets. The inference to be drawn from the testimony of defendant in error is, that there was no slackening in the speed of the train until the conductor returned to the rear of the train and applied the brake. Defendant in error and Dailey agree that defendant was pushed off from a box car, the third car from the caboose, and that it was immediately in the rear of an open coal car.

Without going into the proofs of plaintiffs in error at this time, the testimony of defendant in error and the witness Dailey present numerous improbabilities, and in one respect they contradict each other. It seems unusual that the conductor of the train should be riding in an open coal car four cars ahead of the caboose while two brakemen were comfortably seated in the caboose. The original declaration charged the assault to a certain **brakeman**, acting in the line of duty, etc., and an additional count was filed charging the assault to one of the servants of the defendants in charge of said train, and one who had authority from said defendants to eject said plaintiff from said train. It was shown by the rules of said railroad company that no one but the conductor had such authority. Dailey and defendant in error did not identify the conductor of the train as the assailant until they saw him at the first trial. It seems impossible that the conductor, Hensley, could have traveled the distance of four car lengths or approximately one hundred eighty feet, and appeared at the rear door of the caboose within the time delineated by the witness Dailey, and the explanation that he probably dropped off from the west side of the train and waited and caught the caboose is nearly as fanciful as that he is in the middle of the train at any time between stations. Defendant in error places Hensley on the north side of the box car in making the assault

to eject a trespasser. Hensley had no knowledge that defendant in error was injured until he returned to the caboose. If Hensley were engaged in ejecting trespassers, it would seem more natural for him to drop off of the east side of the train, if he dropped off at all, to see that the trespasser did not again attempt to board the train. Defendant in error first testified that he had gotten on the stirrup of the ladder and was starting to climb up to the top of the car, his hands being then just about a foot from his eyes, and he was up and climbing up. He states that he was going up a step and just then "he stepped on my hands and kicked me in the side." In this impossible position defendant in error first testified that his assailant, standing with one foot on the ledge of the box car and with his other (the left) foot on the ledge of the coal car, brought the left foot around and stepped upon his hands and then kicked him in the side. This would be physically impossible while defendant in error's hands and head were well toward the top of the car. Therefore, on cross-examination defendant in error was compelled to state that his assailant, before stepping upon his hands, had gone up an iron ladder on the front of and to the east side of the box car, and was above him when he stepped upon his hands. Hensley, the conductor, if he made the assault, in order to step on the hands of defendant in error, must have climbed well to the top of the box car and after stepping upon the hands would have to come down on the ladder at least one or two rungs before defendant in error could be kicked in the side. It is quite impossible to see how the assailant could step on the hands of defendant in error, one of which, at least was up even with his head, and then kick him in the side unless the assailant was a "mid air" acrobatic actor. It may be further suggested that if defendant in error was climbing the ladder at the side of the car, it is quite unlikely that both of his hands would be upon the same rung and in

such a position that both hands would be injured in the same manner at the same time. Dr. Wolfert testified that both of his hands were bruised on the outer surface and also on the inner surface, and that over the area of the knuckles back on to the hands the skin was torn off and they were black and blue. This condition was doubtless caused by being dragged on the ground and not by being stepped upon.

Dailey testifies to a different situation. He states that at the time the assault was made upon defendant in error the conductor had one foot on the coal car and one foot on the box car and that he drew the left foot around from the coal car in making the assault, and stepped upon and kicked the hands of defendant in error and shoved and kicked defendant in error off the train. In doing this Dailey testifies that the conductor had his right foot on the north end of the box car on a rung of the ladder. Dailey says nothing about the assailant climbing up the ladder or moving in any manner above the ledge of the box car. It is an unusual circumstance that Dailey should see this man between the box car and the coal car in the middle of Nineteenth Street just as defendant in error had "caught" the car, and then run along with the train close to defendant in error for about one hundred and forty feet to witness an accident which Dailey apparently presaged on first view, and to be ready to catch defendant in error in his arms.

We have set out thus fully the testimony for defendant in error for the reason that either defendant in error and Dailey have testified to a manufactured story as to the wilful injury; or, if the story be true, then at least six of the witnesses of plaintiffs in error, some of whom are disinterested, are guilty of concerted perjury.

It was shown by two witnesses for plaintiffs in error, one J. W. Cassidy, a newspaper publisher of twenty-five years'

experience in Granite City, and George Schwartz, a Granitoid contractor of the same place, both of whom were in an automobile on Nineteenth Street, about thirty-five feet from the Alton tracks, going westerly over the tracks but blocked by the train, that the accident occurred in the following manner: "While we were sitting there, a couple of young men were there, and one young man was making attempts to get on the train and the other stood in the same spot, and this young man would run along with the train and would attempt to get on one of the cars. I should say he made a half dozen attempts and finally he grabbed the handle bar and the speed of the train got to such an extent it jerked him and the momentum threw him under the car. At the time that he made the last attempt to get on the train and was thrown there was not any man between the north end of the car which he was seeking to get on, and the south end of the car next to him. There was no man between these two cars who stepped upon or kicked the boy's hands or kicked him or shoved him off the train. Nothing of that kind took place. The boy never got his foot into the stirrup but he grabbed the handle bars, and the speed of the train jerked him and he let loose and it threw him under the car at a point about twenty to twenty-five feet north of the north side of Nineteenth Street. When I saw him roll I turned my head away because I expected him to be cut all to pieces."

These witnesses testify to substantially the same state of facts, and Schwartz states that as the train passed by he saw a man on the back steps of the caboose and that he turned around and the train made a sudden jerk and started to stop. Dailey claims the conductor came to the rear platform further up in the block.

George Thompson, a watchman for the Terminal Railroad, was at the Nineteenth Street crossing and saw the accident. He testified: "I saw a man go out a little past the middle of Nineteenth Street to the south,—he went to the south end of the crossing,—he run

with the train—he failed to get a hold, so he goes back to the south end of the crossing and runs again with the train,—I think he made three runs—I know he made two runs, and the last run he made, he grabbed for the train and it flopped him to the ground and he did not get up again, I should judge the train jerked him about ten feet, and after the train passed he was lying alongside of the rail about forty feet north of the north sidewalk on Nineteenth Street. In none of these attempts to get on the train did he get his foot into the stirrup of the car. There was no man at all between the end of the car from which he fell and the end of the next car. The only man I saw was a man standing on the back end of the caboose. There was not a man between the car from which the boy fell and the end of the next car in front of it who stepped on his fingers as they were on the ladder rail, or kicked him or pushed him off the train.”

The brakemen Kemp and Ayresman were in the cupola of the caboose before the Nineteenth Street crossing was reached, and both testify that Conductor Hensley was writing at his desk in the caboose during all of this time. When Kemp saw that the train was crossing to the wrong main, he went to the rear of the caboose and down the east side steps. He saw the entire accident and relates the particulars in substance as testified to by Cassidy, Schwartz and Thompson. Ayresman saw and relates some of the circumstances corroborative of the testimony of Cassidy, Schwartz and Kemp. He and Kemp are both positive that Hensley was in the caboose writing at his desk during all of this time. Hensley, the conductor, was also a witness and states that he was in the caboose working from the time the train left East St. Louis until it reached Granite City, and he states the work he was doing and produces portions of it. As to the accident Hensley testified as follows:

“As we approached the cross-over at Granite City I was at my desk in the caboose which is at the rear of the caboose and I was sorting my bills.

“After passing the interlocker a brakeman sitting in the cupola informed me that we were running the wrong main at Granite City,—I don’t recall distinctly which one of the brakemen it was,—both of them were riding in the cupola, and I was then at my desk. Kemp then got down out of the cupola and in pursuance of my direction, he walked back to the rear end of the caboose and went out on the platform and onto the steps of the caboose on the east side. At that time I was at my desk writing. From the time that Kemp went out on the rear platform and up to the time that I received information about the injury I did not leave the caboose. From the time we went over the cross-over to the time that I received information of the injury I was sitting at my desk. From the time we crossed over the cross-over until after the man was injured I was not out of the caboose. Ayresman gave me the information that a man had been injured and I went to the tail hose, opened up the angle cock to release the air. At the time of the accident I was not standing between a box car and a coal car in front of it about three cars north of the caboose. I did not, in such position, or in any other position, step on the fingers of or stamp on the fingers or hands of any man who was attempting to mount the front end of the box car. I did not push or kick any man who was attempting to mount the steps of the box car. I did not on that day have a blue and white checked shirt or jacket nor did I have a red bandana handkerchief around my neck. The rear end of the caboose stopped to clear Twentieth Street. I am still working for the receivers of the Chicago & Alton and am here as a witness at their request.”

The train was made up at East St. Louis by the yardmen. The road crew had nothing to do with making up the train. After the train was made up, it was the duty of the conductor to make a record of the various cars in the train in a book furnished by plaintiffs in error to the conductor for that purpose. This book for the day and train in question was produced, and the original entries made by Hensley on September 4, 1923, of the various cars

in the train was produced. Hensley, the conductor, testifying from the book, stated: "The last car in the train next to the caboose was U. P. 122460 loaded with merchandise and was a box car. The next car to that was an L. & N. coal car No. 61466, loaded with coal. The third car ahead of the caboose was a Big Four box car No. 6725 loaded with bath-tubs. The next car, being the fourth car ahead of the caboose, was B. & O. box car No. 183487 loaded with pipe fittings. The fifth car ahead of the caboose was U. T. L. tank car No. 24276. The sixth car was C. & E. I. box car No. 61269. The seventh car ahead of the caboose was L. & N. No. 36442, a coal car loaded with pig iron. The eighth car ahead of the caboose was C. & A. No. 27493, an automobile box car. The ninth car ahead of the caboose was U. P. 172483, an automobile car, and the tenth car was B. & O. No. 250471, a coal car loaded with pipe.

"As we passed through Granite City and went over on the wrong main and at the time of the injury those ten cars were in the position in the train as shown by this book."

From this testimony, which is not impeached or attacked in any manner, a record is shown by which it appears impossible that defendant in error attempted to board the front end or side of a box car—the third car in front of the caboose—which was preceded by an open coal car immediately preceding it. Defendant in error and Dailey both testified positively that the assault occurred at the front end of a box car, the third car in front of the caboose, and that an open coal car preceded it.

Dr. Fitzgerald of Granite City attended defendant in error at the hospital, and states that he was conscious and able to talk rationally and that defendant in error stated to him that he was catching a train and was thrown under; but the witness did not remember that he said anything in regard to being kicked or shoved off from the train by anyone.

Charles Groth, a policeman in St. Louis, accompanied defendant in error in an ambulance to a hospital in that city. The witness

asked defendant in error how it happened and testifies: "He said his foot caught him in the switch and the train came along and cut it off."

Plaintiffs in error offered to prove that the witness Cassidy, who was a newspaper publisher and who viewed the accident, published on September 6, 1923, in his newspaper in Granite City the following account of the accident:

"ST. LOUIS YOUNG MAN MEETS WITH ACCIDENT.

"Edward Gross, 23, 205 Sydney Street, St. Louis, while attempting to hop a Chicago & Alton northbound freight train in the railroad yard at Nineteenth street and Railroad tracks here shortly after 10 o'clock Tuesday morning, fell under the wheels of one of the cars when he failed to hold onto the side bars. One of his legs was crushed, and it was necessary to amputate it, near the ankle, at St. Elizabeth's hospital. Gross, who is unmarried, had made several attempts to catch the freight, which was going, it is said more than 25 miles an hour. Two or three cars passed over him as the speed of the train threw him underneath when he could not hold to the handle rails. He is in a serious condition. Another man who was with Gross, did not try to catch the train. This man said he did not know the injured man very well."

It has been held in many cases that when a witness is charged with testifying from motives calculated to induce him to make false statements, he may be proved to have made similar statements at a time when motives of self-interest would, if his statements were true, have induced him to make a different statement of facts. (**Rogers v. State** 41 L. R. A. (N. S.) 901; **Gates v. The People**, 14 Ill. 433; **Stolp v. Blair**, 68 id. 541; **Chicago City Railway Co. v. Matthieson**, 212 id. 292.- The court erred in not admitting the testimony. The rule laid down in **Reavely v. Harris**, cited by defendant in error, does not apply to the facts in this case. It was shown in the proofs that between Alton and East St. Louis the Chicago & Alton Railway, plaintiffs in error and the Big Four

operated together, that is, each railroad used the same track in a two-way traffic, and that the train in question at Granite City, on account of some emergency, having received the signal to cross over, was entering upon the line against the current of traffic and could proceed only upon a "31" order, which required the conductor of the train at Granite City personally to sign a clearance order and hand a copy of the same to the engineer. Kemp, the rear brakeman, testified that when he saw the train was passing over from the "Big Four" tracks to the Alton, which was directed by semaphores to the engineer, he got down from the cupola in the caboose and went to the rear platform and down the step so as to be in position to take a "hook" order, which would be an order under Rule 19. Much stress is laid upon this apparent variance to color the entire testimony of Hensley, Kemp and Ayresman the train crew. Kemp testifies that as he passed to the rear of the caboose Hensley, the conductor, was writing at his desk and he spoke to him. It is not shown whether or not the train in question had work for which it was required to stop at Granite City, or whether the cross-over of the main was a temporary cross-over or where the emergency existed. Nothing is shown except the rate of speed at which the train was running, which was fifteen to eighteen miles per hour. From Ayresman's testimony, under the rules if the signal to cross over meant to proceed upon the wrong main against the current of traffic, it would have been the duty of the engineer, assisted by the rear brakeman Kemp, to have stopped the train with the air. The train did stop a few hundred feet from the place of the accident and at a place where the caboose was very close to the depot. Whether the engineer had intended the train to stop at that point or not, the record does not disclose. In any event, it was a matter that did not concern the brakeman so far as orders were concerned. Hensley, the conductor, stated that it was not true that in accordance with the rules of the company he must have a "31" order before pro-

ceeding on the wrong main and against the current of traffic, and that a "19" order does not have to be signed by the conductor. From the rules covering a "31" order and a "19" order, which were introduced in evidence, we are unable to determine whether the particular exigency called for either of these orders.

Hensley testifies: "I didn't see the operator standing out there in front of the depot with a ring with a 19 order on it for I was in the caboose. I don't know whether Kemp got a 19 order but either Kemp or Ayresman got it. I did not get a 31 order after stopping at Twentieth Street. The engineer already had his orders and was on his way before I received mine. I was in the caboose. The engineer didn't sign for a 31 order because he didn't get a 31 order. If that operator wasn't there with a 19 order I said we could not proceed further north without order. I would have a pretty good idea, as I came up there, what kind of an order. I would receive. I am familiar with the rule book."

The subject matter was immaterial so far as the merits of the controversy was concerned. To give the effect contended for by defendant in error, it only lends an inference that some of the employes of plaintiffs in error, and more particularly the engineer, were acting contrary to the orders and were negligent.

The fourth car from the caboose in the train in question, which defendant in error and Dailey testified was an open coal car, according to Hensley's testimony and the original record made by him on September 4, 1923, was a box car loaded with pipe fittings. The first coal car in the train from the rear was the seventh car from the caboose.

Upon a careful review of all the testimony in this case we can come to no other conclusion than that the verdict and judgment are manifestly against the weight of the evidence. Taking the testimony in this case and considering it from every angle, it is impossible to reconcile the conflicting statements of the respective parties on any theory of mistake, misadventure, or lack of memory.

Either defendant in error and his corroborating witness have related a fabricated tale or, on the other hand, Thompson, Cassidy, Schwartz and the entire railroad crew, consisting of the conductor and two brakeman, have concerted a plan to commit perjury and fully carried out their foul plot. Not only that, but Hensley, the conductor, in East St. Louis, on the morning of September 4th, 1923, before the accident, purposely misarranged the cars of his train in his record book to foil defendant in error from arriving at the truth. In such a case the slight differences in the testimony of any witness on the two trials is of little moment. That defendant in error, testifying for the first time upon this trial and stating a different version of the manner of assault upon him from the statement made by his witness Dailey, is of moment, and that each statement is improbable has, in a measure, moved this court.

Defendant in error, who is twenty-six years of age, testifies that in 1919 he was convicted of robbery with a weapon, and that with force and violence he took from a certain person \$40.70 and one pistol. This does not add to the credibility to be given to his testimony. Under all the circumstances of this case we feel that we are more than warranted in finding that the verdict and judgment are manifestly against the weight of the evidence.

Plaintiffs in error complain as to the giving of certain instructions on behalf of defendant in error. Instruction number two is an instruction as to the weight or preponderance of the testimony and omits the element as to the number of witnesses testifying for either side or as to any fact. This was error. (**Noone v. Olehy**, 297 Ill. 169; **Ogren v. Sundell**, 220 Ill. App. 587.) Instruction number three informed the jury that if they believed the plaintiff "was a trespasser," then defendant's servants "had the right to eject the plaintiff from the train," etc. This instruction assumes that the servants of defendants did eject him and was error. (**I. C. R. R. Co. v. Berry**, 81 Ill. App. 17.)

Plaintiffs in error offered an instruction informing the jury that if they believed from the evidence "that while plaintiff was attempting to get upon the train, some person struck, shoved and kicked plaintiff, causing him to fall and receive his injuries, nevertheless, if you shall further believe that such person was not Hensley, the conductor, then and in such case you should find defendants not guilty." Under the circumstances of this case the instruction should have been given.

For the errors pointed out, the judgment of the Circuit Court of Pike County is reversed and the cause remanded.

Reversed and Remanded.

6742a

249 I.A. 659¹

General No. 8150

Agenda No. 22

OCTOBER TERM, A. D. 1927

In the Matter of the Estate of William H. Roberts,
Deceased, Maude Mikel, Appellant,

vs.

Jacob Amstadt and Harry L. Roberts, Executors,
Etc., Appellees.

Appeal from McLean County Circuit Court

SHURTLEFF, P. J.

Appellant presented her claim against the estate of her father, William H. Roberts, deceased, to the Probate Court of McLean County, for the sum of eighteen hundred dollars for labor and work furnished her father during the last five years of his lifetime, at his request, and for care bestowed upon deceased during said time and for supplies furnished at his request. There was a trial in the Probate Court and a judgment, and the cause was appealed to the Circuit Court of said county, in which court a jury was waived, the proofs heard and the cause submitted to the court. Proofs were submitted by claimant showing or tending to show that claimant, who lived with her husband and family about two blocks from the residence of her father in the village of Downs, in said county, had worked for and cared for her father and mother until her mother's death, which was two or three years prior to her husband's death. After that time she worked for and cared for her father, doing his washing, cooking his meals and furnishing him with supplies, milk and other articles and nursing him until his death, which occurred in the month of September, 1925.

Counsel for appellees charge that some of this testimony was vague and uncertain, but an examination of the record shows that the court below was fully warranted in making its findings in regard to these matters. Proofs were offered, which were apparently

uncontradicted, tending to show that the deceased in appellant's presence and out of it frequently told friends and neighbors that Maude was the only one who did anything for him and he was going to give her his home in Downs when he was done with it for taking care of him.

We have examined the record and the court was fully warranted in the finding it made upon this subject. The court below made the following findings in behalf of appellant upon the proofs, namely:

2. "The court holds that the statement by the deceased made to others in the presence of claimant that he was going to give her his home in Downs, Illinois, when he was through with it to compensate her for services rendered him, indicates the value the deceased put upon those services and constitutes the measure of damages in this case.

3. "The Court holds that the uncontradicted evidence in the case shows that at the time the alleged services were rendered by claimant to the deceased that both she and the deceased expected those services to be paid for, claimant expecting to receive payment and the deceased to make payment therefor, and that as a matter of law a contract for the rendition of services and the payment therefor is implied in law.

4. "The Court holds that the making of statements by the deceased to others in the presence and hearing of claimant that he intended or expected to remunerate her for her services to him would in law give her the right to understand that she was to receive payment for such services.

5. "The Court holds that under the law applicable to the evidence in this case claimant has proven by a preponderance of the evidence her claim against the estate of William H. Roberts, deceased, in the amount of the value of the home in Downs, Illinois, left by the deceased, as it existed at the time of the deceased's death.

7. "The Court holds as a matter of law that under the evidence in this case the claimant is entitled to compensation for the services by her rendered to the deceased, notwithstanding her relationship to him."

To which holdings of the Court on behalf of claimant the defendants, by counsel, then and there excepted.

The Court held appellees' second finding as applicable to the case, namely:

2. "The Court holds as a matter of law that the plaintiff has failed to prove the value of the services claimed to have been rendered by her or the milk and supplies claimed to have been furnished by her or the value of the Downs property, and that therefore in no event can she recover more than nominal damages in this proceeding."

There were other findings held and refused, but none of them do we deem of importance as affecting the merits of the case.

We have examined the record and read the testimony and we are in accord with the Circuit Court of McLean County in making the findings in behalf of claimant in her second, third, fourth, sixth and seventh findings offered. The Court found the issues for the claimant and entered judgment in her behalf for nominal damages in the sum of one cent. From this judgment appellant has appealed and appellees have filed cross errors but do not desire the judgment reversed. The record is before us for review.

The first and principal error assigned is that the Court erred in holding for appellees that appellant had failed to prove the value of the Downs property. Appellant made no attempt to prove the value of her services under the **quantum meruit**, relying upon the oral agreement to give her the home as fixing, in its value, the amount to be paid for her services. As to the value of the house and lot in Downs, appellant offered S. S. Ferguson, a disinterested witness, who testified: "I sold my property in

Downs six months ago. I was fairly familiar at the time of his death of the values of residence property, such as his, there in Downs." The witness was asked if he had an opinion as to what this particular property was worth at the time of Mr. Roberts' death. He answered, subject to an objection, that he thought it was worth about eighteen hundred dollars. Charles W. Roberts, a son of the deceased, testified that his knowledge of its value was based upon what he had heard men say they wanted to buy it for. He testified, subject to objection, that a sale of this property could have been arranged for two thousand dollars if the suit could have been settled, and gave his opinion that its value was around eighteen hundred dollars. Mrs. Lena Talbott, a disinterested witness, testified that her son offered the executors fifteen hundred dollars for the property. None of this testimony was stricken out or contradicted. Appellees offered no testimony as to the value of the property. They contend that none of the witnesses were competent or qualified to testify as to values, although each of them had lived in Downs for a great many years. Appellees cross-examined none of these witnesses as to their qualifications. The witness Ferguson was certainly a competent and qualified witness, and his testimony is not impeached or in any manner discredited. In **Kelly v. Jones**, 290 Ill. 378, it was held: "There may be such inherent improbability in the testimony of a witness as to justify a court in disregarding his evidence even in the absence of any direct contradiction. If his testimony is contradictory of the laws of nature or universal human experience, so as to be incredible and beyond the limits of human belief, or if facts stated by the witness demonstrate the falsity of the testimony, the court is not bound to believe him. (**Podolski v. Stone**, 186 Ill. 540; **Kennard v. Curran**, 239 id. 122; **People v. Davis**, 269 id. 256; **Kuehne v. Malach**, 286 id. 120.) There was no inherent improbability in the testimony of the

complainant and nothing incredible about his statement that he sold stock to go into certain business enterprises in Joliet. There was no reason arising out of the testimony of the complainant for disbelieving him. If there is a contradiction of testimony, either direct or by facts and circumstances proved, much weight is to be given to the findings of the chancellor, who saw and heard the witness, since his credibility may be seriously affected by his appearance, manner and conduct while testifying. (*Coari v. Olsen*, 91 Ill. 273; *Ellis v. Ward*, 137 id. 509; *Bouton v. Cameron*, 205 id. 50; *Hill v. Fowler*, 231 id. 205; *Kirby v. Judy*, 286 id. 200.) But there was no question of weighing the testimony of the complainant against contradiction, since there was no contradiction whatever of the facts testified to. Where the testimony of a witness is uncontradicted, either by positive testimony or circumstances, and is not inherently improbable, it cannot be rejected. (*Larson v. Glos*, 235 Ill. 584.)”

To the same effect is *Deheave v. Hines*, Dir. Gen., 217 Ill. App. 427. Ferguson was also corroborated to some extent by Roberts and Lena Talbott, and in the opinion of this court the Circuit Court erred in finding that claimant (appellant) had not established the value of the Downs property at the time of the decease of her father. Claimant’s claim was based upon the oral agreement of her father to convey to her his residence property in Downs, in consideration of her services. The contract as an agreement to convey land, is, of course, within the Statute of Frauds, but it has been held in *Laymon v. Estate of Henry Francis*, 213 Ill. App. 90: “We are satisfied with these rules as productive of practical justice. It follows that if, on another trial, the jury find that the services were rendered under a contract that they should be paid for by a conveyance of the home place by the father to the claimant, and that such conveyance was not made, then claimant would be entitled to recover the value of said home place

when the father died, and it would in such case be a question for the jury, under the proofs then presented, whether said \$300 paid to her by the note referred to should be treated as a payment thereon.”

This case was retried in the Circuit Court and the claim allowed for the value of the “home place,” and was again appealed to the Appellate Court of the Second District and the judgment was affirmed. **Laymon v. Estate of Henry Francis**, 215 Ill. App. 655.

While an oral contract may be void under the Statute of Frauds, and a recovery may not be had thereon, yet such oral contract may be shown in evidence, and it is competent as tending to show, not only that there was an understanding between appellant and her father that she was to receive pay for such services and that he expected to pay her for them, but the contract establishes the value which the parties themselves, and particularly the deceased, placed upon the services. The court below found that this was the correct rule of law, and we are satisfied with that finding. Appellant, having performed the services under a definite and express contract, can not recover under the **quantum meruit**. (**Wilson v. Wilson**, 125 Ill. App. 390; **Peyton v. McLennan**, 129 id. 656.)

Deceased died leaving four children. His estate consisted of the home in Downs, a small farm of about thirty acres, and a small amount of other property. He left a last will and testament, which was probated, and which bequeathed the sum of five dollars to one son, and after the payment of his debts the balance of his estate was devised to his other son and two daughters, including appellant, in three equal parts. The oral agreement was never carried out.

A jury having been waived in the Circuit Court of McLean County, the proper practice warrants this court in reversing the judgment of the court below and entering the proper judgment in this court, with a finding of fact. (**The Manistee Lumber Co v. Union National Bank of Chicago**, 143 Ill. 490; **Blake v. De Jonghe Hotel Co.**, 263 Ill. 472; **Osgood v. John Skinner et al**, 186 Ill. 491; **The People**



ex rel, etc. v. **J. R. Harris et al**, 164 Ill. App. 136;
O'Farrell v. Vickerage, 184 Ill. App. 303; **Chicago
Mill and Lumber Co. v. Townsend**, 203 Ill. App. 469;
Donchian v. Chicago City Express Co., 217 Ill. App.
132.)

Accordingly, the judgment of the Circuit Court of McLean County is reversed and judgment is entered in this court that claimant (appellant) have and recover from the estate of William H. Roberts, deceased, the sum of eighteen hundred dollars to be paid in the due course of administration.

Reversed and judgment entered in this court with a finding of fact.

Finding of Fact to be Embodied in the Judgment Here.

We find as a matter of fact that William H. Roberts in his lifetime promised and agreed to pay to his daughter, appellant, a sum of money equal to the value of his house and lot, in Downs, McLean County, for her services and supplies in his behalf, and that the value and worth of said house and lot was eighteen hundred (\$1800.00) dollars.

6743a
249 I.A. 659²

General No. 8156

Agenda No. 49

OCTOBER TERM, A. D. 1927

John McHenry, Appellee,

vs.

Jacksonville & Havana Railroad Company, Appellant.

Appeal from Circuit Court, Sangamon County.

SHURTLEFF, P. J.

This is a suit in assumpsit by appellee against the appellant to recover for labor and services claimed to have been performed by appellee for and on behalf of appellant, in the sale of stock, salary and expenses at the request of appellant. There was a verdict and judgment in behalf of appellee in the sum of five thousand dollars after a remittitur in the sum of \$1024.59, and appellant has appealed.

The suit grows out of matters pertaining to the organization of appellee railroad company, and during the times the transactions in question were being carried on appellee was vice president, a director, a subscriber for stock and a stockholder in appellant company. Appellee acted as such vice president and director and devoted a portion of his time to the sale of stock in said railroad company and the affairs pertaining to the organization of said company by virtue of a contract which he had with Andrew Stevenson, the president of appellant railroad company. Appellee testified that the board of directors did not vote him a salary or employ him, and that the only man with the company who engaged him or solicited his services was said Stevenson. Appellant attempted to defend under the general issue and proper notice of its defenses which were filed, the grounds being that appellant never promised to pay appellee any part of the sum claimed by

appellee as salary, and that the sums claimed to have been expended on behalf of appellant were not expended at its request.

Appellant offered in evidence certain by laws of appellant railroad company, in the adoption of which appellee had taken part, as follows:

Article 2, section 1: "All the corporate powers of the company shall be vested in and be exercised by a board of seven directors who shall be stockholders of the corporation and shall be elected by ballot at the annual meeting of the stockholders at the public office of the company in the City of Springfield. The directors shall, in all cases, act as a board, and the individual directors shall exercise and have no powers as such. Any or all the directors may be removed by the vote of the holders of two-thirds of the number of shares of the outstanding capital stock of the company at any special meeting of the stockholders."

Article 3, section 2: "The salary and compensation of all officers and agents, elected or appointed by the board, shall be fixed by the board. If any vacancy shall occur among the officers of the company such vacancy shall be filled by the board of directors."

And Article 4: "All deeds, mortgages and contracts and agreements of every character, and all bonds, notes, bills, checks and obligations of every description shall be executed by at least two officers of the company, who shall be designated by the board of directors, otherwise the same shall not be binding upon the company."

The court sustained objections made and refused to admit the by laws in evidence. This was error. Under these by laws the president of the company, Stevenson, was shorn of all power to employ assistants or enter into contracts, or to bind appellant company to pay any salaries to any officer or person. None of

these acts could be performed by any authority except the board of directors. These by laws were binding upon appellee as a stockholder and officer in said company, (14 Corpus Juris, 346, **Cratty v. Peoria Law Library Ass'n.**, 219 Ill. 523; **Supreme Lodge K. of P. v. Kutscher**, 179 id. 344; **Mandel v. Swan Land & Cattle Co.**, 51 Ill. App. 209.)

In Cratty v. Peoria Law Library Ass'n. *supra*, the court said:

"The by-laws in question operate as a contract between the corporation and the shareholders, who took their shares in reliance upon them. (10 Cyc, 651.) The meaning of the contract created by the by-laws is not obscure, and it is both usual and proper to assume that parties intend by their engagements what the language used by them naturally imports."

And the court further said in the same case: "The contract, like any other one, is not to be abrogated or set aside by construction, on the ground that the performance of it would be inconvenient or unfavorable to either one of the contracting parties."

Cases cited by appellee touching contracts between the corporation and strangers, such as **Quigley v. Macqueen & Co.**, 321 Ill. 124, are not in point. Prior to and during the transactions in question appellee had subscribed for and agreed in writing to purchase preferred stock in appellant corporation to the amount of \$12,800, upon which subscription call had been made by the railroad corporation for its payment, and suit had been commenced by appellant against appellee in the same court to collect the amount of said subscription, less the sum of six thousand dollars. It was claimed by appellant that on September 13, 1926, a meeting of the board of directors of appellant company was held to take into consideration the claims, demands and bills of appellee in connection with the salary, services and expenses of appellee, for which this suit was later brought. Appellee was present at said meeting and took part in the same. It was further claimed that a settlement was arrived at, the result of which was that the said board of directors were to vote an

allowance in favor of appellee for said services and expenses, in the sum of five thousand dollars, and that the same was to be applied upon appellee's stock subscription, and fifty shares of the preferred stock in appellant company was to be issued and delivered to appellee. The record was made in the minutes of the proceedings of the board of directors, and the stock issued. There was an additional one thousand dollars allowed to appellee for services by the board of directors and applied in the same manner to appellee's stock subscription, and it was claimed that appellee was present and agreed to both of these settlements.

Notice was given of said defense in accord and satisfaction and certain proofs were submitted upon the same. Before the commencement of the trial appellant moved the court to consolidate this cause with the cause brought by appellant against appellee on the stock subscription, upon which there had been a credit made for the sum of six thousand dollars for the items set out. It was suggested and shown to the court that the causes involved the same parties and the same transactions and grew out of the same subject matters. This was not contradicted. The court denied the motion. From all that can be gleaned from the record, it appears that the court abused its discretion in not consolidating said causes.

Before the commencement of the trial, motions were made by appellant for a continuance on the ground that counsel who had prepared the case and had it in charge were to be engaged in the United States District Court at Chicago, in a case set for trial previous to the setting of the case at bar. Affidavits were presented showing these facts, but the court denied the motion. Further affidavits were presented to the court for a continuance, showing the absence of necessary witnesses. None of these affidavits, however, set out the facts to which the witnesses would

testify, if present, until such an affidavit was filed in the midst of the trial. None of these affidavits were introduced in evidence or were before the jury. Nevertheless, counsel for appellee, in presenting his cause to the jury, commented upon certain matters in one of the affidavits and upon objection, in the presence of the jury, the court ruled: "The files in this case are always proper evidence. The files in this case show an affidavit filed in this case because of the absence of Mr. McKee and the Court heard it. And in opposition to that affidavit, evidence was produced before the Court that he was here in the city on the day before that affidavit was filed; and it may be said further as to the files in this case that there is no subpoena or other writ commanding or demanding on the part of the defendant the presence of Mr. McKee as a witness in this case."

At another time before the jury the court ruled: "Objection sustained. There seems to be a wide difference between counsel for defendant and the Court as to what is in issue in this case, judging from the questions that are being asked. I think we might as well get to the issue, which is a suit by this plaintiff against the Railroad Company to recover for services rendered under the employment by the president of the Railroad Company (Stevenson.) If he was employed by the president of the Railroad Company and did render the services for which he was employed, he is entitled to recover: If it is denied that he was employed by the president of the Railroad Company, or it is denied that he was not paid, or denied that he did render service—anything along that line is admissible, but it is not admissible as to many of these things indicated in what has occurred. It is cross-examination; I have allowed it to go on because the witness here is the plaintiff in the suit. You have a right to anything that will disprove or tend to disprove his claim. That is all there is in issue in this case. Don't make any difference what Mr. Sapiro did or somebody else did; that does not pertain to this claim. Proceed with the cross-examination."

At another time when the witness Linney, auditor of the appellant company, was upon the witness stand, the following colloquy occurred: "I have custody of account books of the company; they are correct; they are in the handwriting of my bookkeeper, made under my direction, in my office, that they be made here through a journal entry I made myself, in the regular course of business. This is the original entry showing stock transactions of Mr. McHenry on the journal sheets. I made these journal entries, personally, today.

"Mr. Child (Q): "The treasurer, Mr. Mallin, told you to make that entry today and you wrote it?

A. "Yes, sir, simply because—

Q. "I didn't ask you why.

A. "Yes, you are right.

The Court (Q): "Then why did you testify here that is a book of original entries?

A. "It is the book of original entry.

The Court (Q): "You say you made it today?

A. "Yes.

The Court: "Stand aside. I don't need any testimony of any witness that testifies in that manner. I think he testified very clearly that that was a book of original entry, and testified very clearly that he made it today. And is trying to show that is proof of a settlement made some months ago—I don't know when. I have been waiting here for a day trying to find out what the situation is. It is an imposition on the Court for a witness to take the stand here to testify as to a book of original entry made two years ago and produce a paper—

Mr. Marx: "He didn't say it was made two years ago or anything like that. He said the original entry was in the stock book, which shows that.

The Court: "Wait a minute. I still say it is an imposition on the Court for a witness to get on the witness stand here and testify as to an original entry to show a transaction that occurred six months ago or more by a paper that he made today—

Mr. Marx: "He doesn't show that.

The Court: "—by his own testimony.

Mr. Marx: "He doesn't show that.

The Court: "That is what he testified to. Don't argue with the Court. I heard the witness testify; everybody around here heard him testify.

The Witness: "Entry was made in stock book September 17, 1926."

Frances S. Carter was the secretary of appellant company at the time the settlement was claimed to have been made by appellant with appellees. After the judgment had been entered in this cause and appeal bond filed, appellant discovered for the first time a letter written by appellee to said secretary, under date of October 6, 1926, as follows: "You hold in your possession preferred stock certificate No. 204 for 50 shares of stock in Jacksonville & Havana R. R. Co. and preferred stock certificate No. 361 for 10 shares in the C. S. & St. L. R. R. Co. made in the name of John McHenry.

"You also hold preferred stock certificate No. 205 for 36 shares of stock in the Jacksonville & Havana Railroad Co. and preferred stock certificate No. 362 for 10 shares of the C. S. & St. L. R. R. Co. issued in the name of A. W. Morse.

"I hereby give you notice that these certificates must be held for the account of Messrs A. W. Morse and John McHenry and we will expect to hold you liable in case of delivery to any other parties.

Yours truly,

(Signed) John McHenry,

Vice-President."

Appellant presented a motion to the court below to vacate the judgment, reopen the cause and to grant appellant a new trial. This the court refused to grant on the ground that the appeal bond had been filed and the court had no further jurisdiction over the cause. Appellee should first have moved to vacate the approval of the appeal bond. However, from a consideration of the entire record, it appears that substantial justice has not been done in this cause, and that the testimony should be submitted to another jury. Therefore, the judgment of the Circuit Court of Sangamon County is reversed and the cause remanded.

Reversed and Remanded.

6744a
249 I.A. 659³

General No. 8180

Agenda No. 55

OCTOBER TERM, A. D. 1927

M. M. Huffaker, Appellee.

vs.

Wenzel Fomera, Appellant.

Appeal from the County Court of Sangamon County.

SHURTLEFF, P. J.

On March 2, 1927, in the County Court of Sangamon County, appellee recovered a judgment by confession against appellant for the sum of \$295.52. On March 25, 1927, being at the same term, appellant filed his motion to set aside and vacate said judgment and for leave to plead. On the same day appellant filed his affidavit in support of his motion.

On April 1, 1927, appellant filed an oral motion for leave to amend his motion. This the court denied. On the same day a hearing was had on the motion to set aside the judgment on the affidavit filed by appellant. The court denied the motion and refused to set aside the judgment. Appellant has appealed. We have examined the motion and affidavit upon which it is based. The motion in some respects is inartificially drawn and some of the allegations in the affidavit are deficient. Appellant does charge in his affidavit that appellee was a real estate broker and that the consideration of said note was commissions and compensation claimed to be due appellee for his services in connection with the transfer of certain properties which were owned by appellant and his mother, Theresa Fomera, to and with one Charles M. Coleman for which the full contract was set out. Under the terms of the contract the said Coleman was to transfer and deliver to appellant and his mother, by a good and sufficient bill of sale,

all of the contents then in a certain garage described in the contract, not including any automobiles then in storage, but expressly including any and all liens on any of said cars then held for repairs, and including the right to receipt for and retain the amount of said liens, and the lease of said garage property was to be assigned to appellant and his mother. In other words, appellant and his mother purchased a garage, stock and tools for which they were to convey twenty acres of land owned by Theresa Fomera to the said Coleman, and appellant was to procure, assign and transfer to said Coleman a certain promissory note, signed by one John Schneff to Mary Kaska, and appellant and his wife were to execute a note for fifteen hundred dollars and secure the same by a second mortgage upon a certain one acre tract of land. It was further agreed that appellant and his mother within five days should furnish abstracts of title to the lands to said Coleman, and within the same time Coleman should furnish appellant and his mother a complete inventory of all the goods, chattels and choses in action connected with said garage business and should pay, satisfy and discharge all bills payable which in any manner had accrued in or about the maintenance and operation of said garage, showing receipts, etc., before the deal was finally closed.

Appellant's employment of appellee in connection with this transaction was brought about, as alleged in the affidavit, by the solicitation of the said appellee through an employe in the real estate office of said appellee, requesting appellant to list the said twenty acres of land belonging to Theresa Fomera with the said appellee for sale or exchange; and appellant alleges that in pursuance of said request he did list said tract of land with appellee for sale or exchange, and that he did employ appellee as his agent to find a buyer for said tract of land, or to find a suitable exchange for said tract. It is further alleged that

thereafter said appellee informed appellant that he had found in the said Coleman a suitable person who would sell his said garage and take the said lands in exchange as a part of the purchase price of said garage. The contract is dated February 16, 1927.

Appellant further alleges that on February 17, 1927, in pursuance of said contract, he did deliver to the appellee, as his agent, abstracts of title to said lands, a warranty deed from his mother to the twenty acre tract running to Coleman, and the notes and second mortgage signed by himself and wife, as provided in the contract. It is averred that said papers were turned over to appellee merely as appellant's agent, so that the abstracts could be examined and the exchange finally effected, but that appellee was to hold the deeds and notes until the exchange was finally consummated, the time for which was fixed by the contract to be March 1, 1927.

Appellant further alleges that on February 18, 1927, said deed and mortgage were recorded in the Recorder's office in said county, and that appellant had no knowledge of such recording until February 21, 1927. The affidavit alleges that within five days after the date of said contract he demanded of appellant and the said Coleman a complete inventory of said garage and receipts showing that all the debts against said business had been paid, but was unable to obtain the same at that time or at any time thereafter; and the affidavit alleges that appellant considered rescinding said contract, but that inasmuch as the deeds had been recorded and the notes delivered the affidavit avers: "This affiant further says that rather than go into litigation to have said deed and mortgage and note cancelled and set aside he decided to take possession of said garage an attempt to carry out the deal, relying upon the representations made to this affiant by the said Charles M. Coleman, M. M. Huffaker and G. W. Sponsler as to the contents of said garage and the value thereof and that the same

was free and clear of indebtedness. That this affiant did take possession of said garage on or about the 7th day of March, 1927."

The affidavit further alleges. "This affiant further says and charges the fact to be that soon after taking possession of said garage he discovered and found the fact to be that the contents of said garage were subject to a lien of two executions in the hands of H. E. Chandler, a constable, and that since then the said executions have been levied upon a part of the contents of said garage. And this affiant has also discovered and charges the fact to be that said garage is now subject to divers other debts of the said Charles M. Coleman.

"This affiant further says that since taking possession of the said garage and making the investigation which under the contract he could have made before the final consummation of the deal had his deed, mortgage and notes not been wrongfully and prematurely delivered and recorded, he has found the fact to be that the contents of the garage and the value thereof are not as represented by the said Charles M. Coleman, M. M. Huffaker and G. W. Sponsler, that the said garage is not worth to exceed the sum of six or seven hundred dollars and that said garage is subject to debts owed by the said Charles M. Coleman to practically the amount of its value."

There is the further charge in the affidavit as follows:

"This affiant further says, and now charges the fact to be, that on the 14th day of February, 1927, when the said M. M. Huffaker was supposed to be acting as agent for this affiant, he the said M. M. Huffaker made and entered into an agreement with the said Charles M. Coleman by which he the said M. M. Huffaker was to receive from Charles M. Coleman the sum of \$300.00 if he made the deal in selling the said garage to Fomera, this affiant."

The note upon which the judgment was entered in this cause was dated February 1, 1927, became due March 1, 1927, and was entered in judgment March 2, 1927. It is true that some of the allegations made are loosely drawn and subject to much criticism at

the hands of counsel, but not to all of the criticism made. For example, appellee points out the supposed defect, which appellant does not charge, that appellant had no knowledge of appellee's employment by Coleman to exchange the garage, for which Coleman was to pay him the sum of three hundred dollars. This charge as made must be construed with all the other charges made, and when it is construed with the charge that appellant turned over his deeds and notes to appellee, as his agent in a fiduciary capacity to effect the transfer, and that appellant converted the documents to Coleman's use—a charge upon which perjury could be based, if false—it is not to be inferred or presumed that appellant had any knowledge of appellee's employment by Coleman. The charge that appellee made an agreement with Colman upon which a fee was to be paid by Coleman to appellee, if false, is an allegation upon which perjury could be based. The charges in the affidavit if taken as to their substance show that there was no consideration for the note in question. Appellee did not procure a purchaser ready, able and willing to purchase or exchange for appellant's property, and therefore earned no commission or fee. If a portion of the substance matter set out in the affidavit is true, appellee only furnished a person ready, able and willing to defraud appellant, in which appellee joined. If appellee, as agent of the appellant, was guilty of gross negligence or gross misconduct in the performance of his duties as such agent, then he can recover no commissions and there was no consideration for the note given. (**Sidway v. The American Mortgage Co.**, 222 Ill. 275.) In this case it is held: "The law is that the agent is entitled to his commission only upon a due and faithful performance of all the duties of his agency in regard to his principal. (**Hafner v. Herron**, 165 Ill. 242; **Prescott v. White**, 18 Ill. App. 322.) 'If the agent does not perform his appropriate duties, or if he is guilty of gross negligence or gross misconduct or gross unskillfulness in the business

of his agency, he will not only become liable to his principal for any damages which he may sustain thereby, but he will also forfeit all his commissions.' ”

The same rule is laid down in **Bunn v. Keach**, 214 Ill. 264, and in **Young v. Trainor**, 158 id. 428, it is held that when the testimony merely shows that the agent received a commission from both parties it raises the presumption of unfair dealing, and the burden is upon the agent to show that his principal had knowledge and consented to the transaction. The affidavit does show a **prima facie** defense to said note, and such a showing is sufficient to entitle appellant to equitable relief. (**Condon v. Beese**, 86 Ill., 159; **Oettinger v. Levit**, 186 Ill. App. 104; **McCormick v. Loomis**, 165 Ill. App., 214; **Birtman Co. v. Thompson**, 136 Ill. App., 621; **Nees v. Dumbareld**, 142 Ill. App. 487; **Maston v. Richardson**, 134 Ill. App., 252; **Venom v. Carr**, 130 Ill. App., 309.)

Some criticism is made as to the form of the motion made by appellant, and inasmuch as the motion was made at the same term of court in which the judgment was entered and the original motion made, we know of no reason why appellant should not have been permitted to amend the motion. It was a mere matter of form.

For the reasons stated the judgment of the County Court of Sangamon County is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

Reversed and Remanded with Directions.

Abst.
June 28 - 1928
6745a
249 I.A. 659⁴

General No. 8182

Agenda No. 43

OCTOBER TERM, A. D. 1927

Nellie Wood, Appellee,

vs.

Cecil R. Wood, Appellant.

Appeal from the Circuit Court of Christian County.
SHURTLEFF, P. J.

This is a suit in chancery instituted in the Circuit Court of Christian County to the August Term, 1926, by appellee against appellant, her husband, praying for separate maintenance.

In the bill of complaint filed by appellee she states that she was married to appellant in September, 1910, and that they lived together as husband and wife from the time of said marriage until December 26, 1926; that two children were born to them, Harry A. Wood, age thirteen years, and Mildred I. Wood, age eleven years, both of whom are living.

The bill further represents that during the time they lived together as husband and wife that appellee faithfully discharged all her duties as such wife, and that the defendant, some time after their marriage, commenced a course of unkind, cruel and inhuman conduct toward her, which continued until he finally drove her away from her home, ordering her to leave and announcing that he would not live with her any more, since which time they have lived separate and apart.

The bill of complaint further represents that appellant had been guilty of acts which constituted extreme and repeated cruelty toward appellee, so as to render it unsafe and improper for her to live with him; that he has repeatedly on divers occasions charged her with acts of adultery with other men.

The bill further represents that he has been guilty of other cruel and improper conduct toward appellee; that he had threatened

her life and constantly carried a revolver, and that he compelled her at nights to remain up until all hours of the night, and that he made many other charges against her.,

The bill further represents that the appellant was a man of violent passion and ungovernable temper, and on many occasions addressed the appellee with threats of violence and threatened to take her life; that in consequence of the cruel and inhuman treatment and threats and conduct of the appellant it rendered it unsafe for her to live with or remain with him, and that this was followed by his order compelling her to leave him on December 26, 1925, and that she then did seek refuge with her parents and has not since that time returned to live with the appellant.

The bill further represents that the appellant owned personal estate of the value of twenty thousand dollars; that he had an actual income of at least three thousand dollars, and that he is able to take care of his family.

The bill prayed that appellant be compelled to make a proper and suitable provision for the separate maintenance and support of appellee and the two children, and for the custody and care of the said two children.

Appellant answered the bill of complaint, denied all of the material allegations in the bill and denied that appellee was entitled to separate maintenance, and further denied that she was entitled to any relief whatever at the hands of the court.

The evidence introduced in this case upon behalf of appellee upon the issues as to whether or not complainant is entitled to separate maintenance, consists of the testimony of appellee, her two children and her father and certain exhibits introduced in evidence by her, including a number of letters which she received from her husband.

The evidence on behalf of appellant upon this issue consists of the testimony of appellant alone, and taken altogether tends to show that the appellee and appellant were married in the year

1911, and after the marriage lived in Shelby County. Later they removed to Pana, and afterwards to Taylorville, and that neither of them had any property of any consequence at the time of their marriage; that two children were born to them; that appellant was a mechanic and entered business for himself in Taylorville, where he conducted a garage and accumulated some property; that he purchased a home in Taylorville and paid for the same; that it was a modern cottage and that the family occupied it and got along together much the same as ordinary families do until the year 1925.

There was a hearing before the court, testimony was submitted and there was a finding in behalf of appellee and a decree, which finds that the allegations contained in the bill of complaint are substantially true as stated therein; that appellee performed all of her duties as a wife; that appellant shortly after the marriage commenced a course of unkind, cruel and inhuman conduct toward the appellee, which continued until he drove her away from home, ordering her to leave and announcing that he would not live with her any more, and that he committed other cruel and inhuman acts against appellee, and that she has lived separate and apart from him without any fault on her part, and that the equity of the cause is with appellee. The decree orders that appellee is entitled to separate maintenance from appellant; that she be awarded their home in the City of Taylorville in which to live; that she have the custody of the children, and that the appellant pay her the sum of seventy dollars per month for the maintenance of herself and children, in installments of thirty-five dollars each on the first and fifteenth days of each month, beginning March 15, 1927.

The decree further finds that the sum of four hundred dollars is a reasonable solicitor's fee for appellee and orders appellant to pay this sum to the clerk of the court for the use of appellee, and orders that all of these sums be made a lien upon appellant's real estate. Appellant has appealed.

It is contended by appellant that the testimony does not establish by a preponderance of the evidence that the allegations in the bill of complaint are substantially true, or that appellee is living separate and apart from the appellant without any fault on her part. We have read the testimony and are satisfied that the preponderance of the testimony supports the charges made by appellee, as occurring after the trip to Colorado in the summer of 1925. The proof shows that without any fault on appellee's part, appellant practically drove appellee from their home about Christmas time, 1925, and while the proof does show that at times appellant has had contrite spells and has stated that he wished to live with appellee again, there is a manifest lack of proof that the statements were made in good faith. The conduct of appellant can only be explained on the theory that the charges are true or that he is suffering from a peculiar mental aberration of which neither court nor counsel seemed to observe or take notice. Appellee was entitled to a decree for separate maintenance.

Error is assigned upon the allowance of solicitor's fees to appellee in the sum of four hundred dollars. This allowance was made upon proofs submitted, of which due notice was given to counsel for appellant, but they were not present and apparently these proofs were submitted at the time by stipulation. Members of the bar and practicing attorneys testified to the value of the services of appellee's solicitors from the statement of such services made by appellee's solicitors while they were not under oath. It is charged that this was error. The whole matter, including the decree for appellee's solicitors' fee, was heard by the same presiding judge. The nature and extent of the services were within the breast of the court. Appellee's solicitors were sworn officers of the court. In **Hutchinson v. Hutchinson**, 105 Ill. App. 351, it was held:

"We think the duty of the chancellor was to make an allowance based upon what was the usual and customary, as well as reasonable

charges of solicitors at the Chicago bar for like services, and that he should not have been controlled entirely by the affidavits of the several solicitors in support of the motion. The chancellor had the right to consider his experience, and this court, in reviewing the order, may consider its own experience in such matters, in arriving at a conclusion as to what was the usual and customary as well as reasonable allowance for the fees in question."

We do not think appellant is in a position to raise this criticism on the decree, not having been present at the hearing and not having raised the question in the lower court.

Finding no error in the record that will warrant a reversal, the decree of the Circuit Court of Christian County is affirmed.

Affirmed.

6746a

249 I.A. 659⁵

General No. 8138

Agenda No. 12

OCTOBER TERM, A. D. 1927

Ralph Ratcliffe, a minor by Levi Ratcliffe, his guardian and next friend, Appellant,

vs.

Grace B. Weese, alias Grace B. Ratcliffe, Appellee
Appeal from City Court of Canton, Illinois

ELDREDGE, J.

Appellant filed his bill in the city court of Canton, Fulton County, Illinois, to annul a marriage consummated between appellee and himself. The bill alleges that the parties were married at Davenport, Iowa, April 26, 1926; that he was a minor, under eighteen years of age, and was induced to enter said marriage contract by threats, fear and intimidation exercised upon him by friends of appellee, and officers, who threatened to prosecute him for bastardy, appellee representing that she was then pregnant with a child for which he was responsible and that she had obtained a warrant for his arrest; that on account of his youthfulness and inexperience and lack of funds, he was frightened into said marriage by said threats and intimidations; that after said marriage he ascertained that appellee was not pregnant, that said representations were made for the express purpose of causing the marriage;

that later appellee became pregnant as a result of adulterous relationship; prays for annulment of marriage, etc. Appellee filed her answer admitting the marriage, but denying knowledge of minority of complainant; denies threats, fear and fraudulent representations; admits obtaining warrant and states she thought she was pregnant; admits later ascertaining that she was not pregnant; denies fraudulent purpose; admits subsequent pregnancy, but denies adultery; admits claiming pregnancy advanced one month, but that she believed the same to be true and alleges prior intercourse with appellant.

Upon a motion by appellee, the chancellor entered an order requiring appellant to pay five dollars a week alimony and a solicitor fee of thirty-five dollars. Upon appellant being granted an appeal from said order the court further allowed seventy-five dollars to pay appellee's costs and solicitor's fees on appeal.

Appellant prosecutes this appeal from the order allowing alimony and solicitor's fees upon the theory that the court had no power to allow the same until a valid marriage had been proven. This principle, as a general proposition of law, is correct, but has no application to the facts in this case. There is no question but what there was a legal marriage and could be treated as such by the

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parties thereto, but if appellant was induced to enter into said marriage by fraud and duress, he has the right to have the marriage contract annulled, but until the marriage is annulled the marriage relations between the parties exist. To apply the rule first announced to this case would require the chancellor to hear the whole case upon its merits and first determine whether the marriage should be annulled and appellee would be unable to defend the case for lack of funds. The chancellor did not err in entering the order appealed from and the decree is affirmed.

Affirmed.

6747a
249 I.A. 660¹

General No. 8149

Agenda No. 21

OCTOBER TERM, A. D. 1927

Henry Newman and Fred Danielson, partners doing
business as Newman & Danielson, Appellees,

vs.

Edward Skog, Appellant.

Appeal from Circuit Court, Ford County.

ELDRIDGE, J.

In an action on the case a judgment for \$350.00 was entered in favor of appellees and against appellant in the Circuit Court of Ford County. The declaration consists of two counts, in which appellees charge that appellant negligently drove his automobile into the automobile hearse of appellees whereby the hearse was damaged. The accident happened near the junction of Park and Franklin streets in the City of Paxton, on December 12, 1925. Franklin street runs in a northwesterly and southeasterly direction and Park street, approaching from the south, terminates at Franklin street. Appellee Danielson was driving the hearse, and his partner, appellee Newman, was sitting on the seat with him at the time of the accident, and the hearse, after proceeding north on Park street to its junction with Franklin street, turned to the left on Franklin street with the intention of proceeding northwesterly thereon. Appellant, accompanied by his wife, was driving his automobile southeasterly along

Franklin street toward its junction with Park street. The testimony given by appellees is to the effect that as the hearse reached Franklin street it turned to the left to proceed northwesterly along that street. When it turned the corner appellant's automobile had approached within fifty feet of the corner and the hearse turned toward the right to avoid appellant's automobile and at the same time appellant turned his automobile to the left and struck the hearse, forcing the driver thereof to run it over the curb on the north side of Franklin street causing it to collide with a telephone pole near the curbing. Appellant testified that he was proceeding southeasterly along Franklin street and the first he saw of the hearse was when it turned the corner off Park street on to Franklin street and was coming toward him on the south side of the center line of Franklin street and only about fifty feet from his automobile; that in order to avoid a head-on collision with the hearse, he turned his automobile to the left or toward the north, but as he did so the hearse was also turned toward the north with the inevitable result that there was a collision. No other witnesses saw the accident or testified in regard thereto. The wife of appellant, being an incompetent witness, could not testify. There is no conflict in the evidence as to the fact that appellant was driving his automobile at about ten miles an hour

on the right side of Franklin street, in a proper manner, up to the time he turned his automobile to the north, as he claims, to avoid a head-on collision with the hearse after it had turned the corner on to Franklin street. The evidence establishes the fact that both automobiles, at practically the same time, in order to avoid a collision with each other, turned toward the north. If it was a fact that the hearse turned toward the west on Franklin street too short, so that it would necessarily collide with the automobile proceeding southeasterly on Franklin street, then appellant, when confronted with such a situation, would have had a right to turn his automobile to the north in order to avoid such a collision, and on the trial it was important to his interests that the jury should be accurately instructed as to his rights, under the circumstances, upon his theory of the case. The second instruction given for appellees, states, in substance, that if the defendant negligently failed to drive such automobile on the south side of the center of the pavement and that such negligence, if any, of the defendant, was the proximate cause of the damage to the hearse, and that the plaintiffs were in the exercise of ordinary care, etc., then their verdict should be for the plaintiffs. This instruction assumes that it would be negligence on the part of appellant if he did not continue to drive his automobile

on the south side of the center of the pavement, even if by doing so a collision with the hearse would be inevitable, and ignores entirely the theory of the defense. The third instruction given for appellees, in substance, sets out the material averments of the second count of the declaration stating that that count charges that the hearse of plaintiffs was with due care and caution being driven on the paved portion of a public street and that while so being driven that the defendant, Skog, was driving an automobile upon the same street toward and meeting said hearse, and that in so doing, the defendant, Skog, negligently failed to turn such automobile to the right of the beaten track so as to permit the hearse and automobile to pass without interruption, but that on the contrary, the defendant, Skog, negligently drove said automobile on the left of the center of the paved portion of such street and if the jury believe such charges to have been proven by a preponderance of the evidence, then they should find their verdict for the plaintiffs. The fourth instruction given on behalf of appellees instructs the jury that it is the law that persons driving motor vehicles upon a public street shall, upon meeting, reasonably turn to the right of the center of the beaten track of such street so as to pass without interference, where it is practical, from the nature of the ground, to do so, and that if they believe

from the evidence that the collision in question occurred on a paved public street and that at the place of the collision there was no obstruction on the south half of the pavement, then it was the duty of the defendant, Skog, to reasonably turn his automobile and proceed on the south side of such pavement. The effect of these instructions was to direct a verdict for appellees if the jury believed, from the evidence, that appellant failed to drive his automobile continuously on the south side of the center of Franklin street. The fourth instruction is particularly vicious in that it utterly ignores the exercise of any care whatever in the driving of the hearse by appellees, but flatly directs a verdict in their favor notwithstanding the theory of the defense that appellant had been compelled to turn his automobile to the north side of the street in order to avoid a collision, which would inevitably have taken place through the negligence of the appellees in driving their hearse, if he had not done so. Appellant conceded that he turned his automobile to the left, or to the north side of the street, and under these instructions the jury were practically directed to find a verdict for appellees and could not consistently have done otherwise, especially as the court refused to give the instruction offered by appellant, defining the rule of law applicable to his theory of defense.

The fifth instruction given on behalf of appellees is also erroneous. This instruction attempts to set out the measure of damages, and, after stating that appellees would be entitled to the cost of the reasonable and necessary repairs, if any, to the hearse as a result of the collision, concludes, "and the value of the loss of the use of the hearse while the same was being repaired." If appellees were entitled to recover at all for the loss of the use of hearse, recovery should have been limited to the time they were necessarily deprived of such use while the repairs were being made.

For the errors indicated the judgment is reversed and the cause remanded.

Reversed and remanded.

Abet *Opinions filed*
Jan 23-1928

67478

249 I.A. 660²

General No. 8158

Agenda No. 27

OCTOBER TERM, A. D. 1927

Arthur J. Robinson, Appellee,

vs.

Excelsior Stove and Manufacturing Company,
Appellant

Appeal from Circuit Court, Adams County.

ELDREDGE, J.

Appellee recovered a judgment in the sum of \$1,000.00 in an action of assumpsit for salary, bonus and commissions alleged to be due him from appellant for his services as a traveling salesman, under the terms of a contract of employment during the years 1921 and 1922 and the month of January, 1923.

On this appeal no questions are presented in the brief and argument for appellant except those of fact and no questions of law are involved. The questions of fact which the jury had to determine, related, chiefly, to the terms of the contract between the parties. If the contention of appellee was right as to the terms of the contract then he was entitled to recover. If the contention of appellant should prevail, then the verdict is manifestly erroneous. There is a direct conflict in the evidence upon this point, but in our opinion it strongly tends to corroborate the contention of appellee. In any event, however, there is sufficient evidence to sustain the verdict and, as two juries have found verdicts in favor of appellee, and the

present judgment having been approved by the trial court, and no error in the trial having apparently intervened, the judgment is affirmed.

Affirmed.

6748a
General No. 8126

Agenda No. 5

OCTOBER TERM, A. D. 1927

The People of the State of Illinois, Defendant in Error
vs.

Alex Chesnoy, Plaintiff in Error.

Error to City Court of Litchfield

NIEHAUS, J.

249 I.A. 660³

Alex Chesnoy, the Plaintiff in Error, was convicted in the City Court of Litchfield for the unlawful sale of intoxicating liquor in violation of the Prohibition Act on an indictment containing two counts, and was sentenced to serve 120 days on the State Farm at Vandalia, and to pay a fine of \$300.00. A writ of error is prosecuted from the judgment of conviction.

Several grounds are urged for reversal of the judgment. It is contended that the indictment is legally insufficient. Both counts of the indictment however charge that the plaintiff in error did unlawfully and wilfully sell intoxicating liquor fit for use for beverage purposes, containing more than one half of one per cent of alcohol by volume, without having a permit from the Attorney General of the State of Illinois; this charge embodies all the elements constituting the offense as defined by the statute. **People v. Tate** 316 Ill. 52. Error is assigned on account of the examination of the witness Dennie Reed by the Court. The state's attorney called Dennis Reed, a witness for the People, and then asked the Court to conduct the examination of the witness because he could not vouch for the credibility of the witness; and desired an opportunity to cross examine him; and the Court granted the request of the state's attorney; and after the Court had examined the witness, the state's attorney cross examined him with reference to any alleged sales of intoxicating liquors by the defendant. It is contended by the plaintiff in error that

this proceeding was improper; and that the Court asked leading questions. It is true that some of the questions of the Court were somewhat leading; but the record does not disclose any objection was made either to the procedure adopted or the manner of the examination of the witness by the court, nor the cross examination of the witness conducted by the state's attorney. We do not find anything unfair in the manner of the trial court's examination of the witness; nor anything in the examination that can be considered prejudicial to the rights of the plaintiff in error. It is therefore sufficient to say concerning this contention of the plaintiff in error, that the matters referred to are not subject to review because no objections were made thereto in the court below. **People v. Weisman** 296 Ill. 156; **Dunn v. The People** 172 Ill. 582. It is also urged, that error was committed by allowing the state's attorney to interrogate the defendant concerning a previous conviction for violation of the Prohibition Act; and to offer oral evidence concerning such conviction. This assignment of error is not subject for review for the reason already stated, that no objections were made to the inquiry, by the plaintiff in error on the trial; and he must therefore be considered as having waived his objections to the competency of the evidence. Objections cannot properly be raised for the first time in a court of review. It is also contended, that the instruction given for the People with reference to the testimony of the defendant was erroneous; substantially the same instruction however was approved in **Herschman v. The People** 101 Ill. 568 and **Rider v. The People** 110 Ill. 11.

The record does not disclose any reversible error in the case; and the evidence adduced on the trial appears to be clearly sufficient to warrant the verdict of the jury in finding the plaintiff in error guilty. The judgment is therefore affirmed.

Affirmed.

6749a
General No. 8154

Agenda No. 26

249 I.A. 660⁴
Forrest Dunsworth, Appellee.

vs.

Lena Wheeler, Appellant.

Appeal from McDonough.

NIEHAUS, J.

In this case Forrest Dunsworth the appellee commenced a suit in the circuit court of McDonough county against the appellant Lena Wheeler, to recover damages resulting to her for alienating the affections of her husband, Frank Dunsworth; and for committing adultery with him, by means of which she was deprived of the society affections assistance and comfort of her husband in her domestic affairs. There was a trial by jury, which resulted in a verdict finding appellant guilty, and fixing appellee's damages at \$4500.00, upon which judgment was rendered. This appeal is prosecuted from the judgment.

It is argued, that there was error in the giving and refusal of instructions; also, that the court permitted improper argument to be made to the jury by the counsel for the appellee; and that the amount of damages assessed is excessive. It is contended by the appellant, that the error in the instructions given relates to matters in the instructions that affect the measure of damages. We are of opinion, that the instructions given on that point by both the appellee and appellant present the matter of the measure of damages with substantial correctness; and that there is no reversible error in this feature of the case.

Complaint is made about the refusal to give the following instructions requested by the appellant:

Instruction No. 4 is as follows:

"The court instructs the jury that before you can find under the law in this suit, that the defendant is guilty, the adultery alleged, must be proved to be committed by direct or circumstantial evidence and not on mere suspicion."

Instruction No. 5 is as follows:

"The court instructs the jury that the burden of proof is on the plaintiff to prove that the defendant

wrongfully and wickedly committed adultery with the husband of the plaintiff and if she has failed to make such proof by a preponderance of the evidence, the jury will find for the defendant."

Instruction No. 6 is as follows:

"The court instructs the jury that the law requires, before the defendant can be found guilty in this case, a reasonable degree of affirmative proof; that circumstances merely suspicious are insufficient; that the evidence must be sufficiently clear, satisfactory and conclusive to convince the jury by a preponderance of the evidence, that the defendant is guilty, and if the jury do not believe from the preponderance of the evidence in this case, that adultery has been committed by the defendant with the husband of the plaintiff, the jury will find the defendant not guilty."

Instruction No. 8 is as follows:

"The court instructs the jury that mere opportunity to commit adultery is not sufficient to establish it but there must be proof of facts and circumstances which would lead a reasonable man to believe that adultery has been committed before you find the defendant guilty."

Concerning these instructions, it may be said that instruction No. 4 was properly refused, because the matter therein contained with reference to the necessary proof of the commission of adultery was covered by several other instructions which were given by the court. Instruction No. 5 was properly refused because it ignores one of the plaintiff's claims and right or recovery alleged in the declaration, namely, alienating her husband's affections. The same reason applies to Instruction 6; and to Instruction 8.

The contention of the appellant with reference to improper argument by counsel for appellee, relates to the comments of the counsel in reference to the affidavit for continuance made by the appellant concerning the evidence of an absent witness, Homer Dunsworth; that is to say what the appellant expected to prove by his testimony. The motion for continuance based on the affidavit, was denied upon appellee's admission, that the absent witness would testify to what was stated in appellant's affidavit; and the affidavit thereafter was admitted in evidence. In commenting on appellant's affidavit, appellee's counsel made the following remark: "Now you will notice in this affidavit that Mrs. Wheeler says that she expects to prove by Homer Dunsworth the statements which she made in her affidavit;

but she only says 'expects,' but does not say that she will prove it; or that Homer Dunsworth would swear to the facts which she said he would swear to if he were present." Counsel for appellant made objection to these remarks, and the court made the following ruling: "Counsel has a right, as I understand it, to argue her theory of the law and the court will, if asked, instruct the jury as to the law applicable." The Counsel's remarks were improper and the Court should have sustained appellant's objection; but the court in passing on the matter distinctly stated that he would instruct the jury as to the law concerning the facts set up in the affidavit and afterwards did instruct the jury "that the effect in law as to the statement of the affidavit offered in evidence, as to what could be proved by Homer Dunsworth, is that the plaintiff admits that if said Homer Dunsworth were present he would so testify, and the statement in the said affidavit is to be considered by you the same as if said Homer Dunsworth had been present and so testified." We are of opinion therefore that any erroneous inference which the jury might have drawn from the remarks of appellee's counsel concerning the evidential matters contained in the affidavit, were corrected by the Court's instruction given on that point; and under these circumstances there is no reversible error apparent in this feature of the case. The amount of damages assessed by the jury however, is excessive. The appellee did not make any claim for any permanent alienation of her husband's affections, but in her bill of particulars she limits her claim for damages to the improper relations existing between her husband and the appellant to 'each day beginning January 1, 1925 to and including the 18th day of July A. D. 1925,' a period of a little more than six months. In this state of the record and the proofs, we conclude that the amount fixed by the judgment is largely in excess of what the appellee is entitled to recover; and it is therefore ordered that

unless the appellee remit the sum of \$2500.00 within ten days after the filing of this opinion, that the judgment be reversed and the cause remanded. If the appellee enters a remittitur as above indicated, the judgment will stand affirmed in the sum of \$2000.00.

6750a

249 I.A. 660⁵

General No. 8173

Agenda No. 38

H. F. Hirschle, Appellee.

vs.

S. H. Cummins, Appellant.

Appeal from Sangamon.

NIEHAUS, J.

This is an appeal from a judgment for \$142.00 in favor of the appellee, H. F. Hirschle, against the appellant, S. H. Cummins, rendered in the circuit court of Sangamon county. This case was pending on appeal in the court below, from a judgment of the Justice of the Peace; and a trial was had by the Court without the intervention of a jury. Concerning the nature of the claim for which the appellee sued, and upon which he bases his right to recover, he testified, that his occupation was that of carpenter and contractor; that he remodeled a building for the appellant, S. H. Cummins, situated on appellant's property on East South Grand Avenue in the city of Springfield; that he repaired the roof and put a glass front in; and run a partition north and south through the building. That he put the partition in so that the appellant could put in a barber shop on one side and a restaurant on the other. And that appellee's nephew had worked with him on the job; that he and the nephew together put in 142 hours on the job; and that he had an understanding with the appellant, that the appellant was to pay \$1.00 an hour for the work done; that the work was done in the month of May in 1923; and that he was never paid anything for this work.

The testimony of the appellee was not contradicted by the appellant who was a witness in the case; nor was there any denial made that the work was done as testified to; and that the amount due for the work was as stated by the appellee. A number of witnesses were called, who testified with reference

to work previously done by the appellee and others on another job for the appellant, and there was evidence concerning financial complications and adjustments concerning this other job, between the appellee, one Charles Eynan and the appellant; but none of the evidence adduced shows that the appellant had paid for what was due the appellee on the East South Grand Avenue job; nor that he had any legal set-off by reason of the transactions occurring between the appellant, the appellee and Eynan; and it does not amount to a defense against the appellant's liability for the claim sued for in this case. The finding of the court that the sum of \$142.00 was due the appellee from the appellant, and rendering judgment therefor, was proper. At the conclusion of the evidence, the appellant asked the court to hold as the law, fourteen separate propositions concerning the matters in controversy, and error is assigned on the court's refusal to hold these propositions the law of the case. But there was no error in the court's refusal inasmuch as the propositions pertained to matters which were not pertinent to the issue involved in the case.

We find no reversible error in the record, and judgment is therefore affirmed.

Judgment affirmed.

Abstract

Feb 28 - 1928

249 I.A. 660

General No. 8160

Agenda No. 4

OCTOBER TERM, A. D. 1927

Ella Gidel, Appellee.

vs.

John A. Gidel, Appellant.

Appeal from Circuit Court of Logan County

SHURTLEFF, P. J.

Appellee filed her bill in the Circuit Court of Logan County charging cruelty and alleging that appellant had violated his marriage duties and obligations in the grossest and most flagrant manner, and charging that as his wife she was living separate and apart from him without any fault on her part, and praying separate maintenance. The chancellor heard the proofs, granted the prayer of appellee's bill and ordered appellant to pay to appellee the sum of twenty dollars per month as separate maintenance by the terms of a decree entered. The decree also provided that appellant pay the solicitor's fee of appellee. Appellant has appealed.

Appellant and appellee were married in 1920 and at the time of the trial appellee was sixty-eight years of age and appellant sixty-three years of age. Appellee had never been previously married. Appellee was the owner of a home in the City of Lincoln, where appellee and appellant lived after their marriage until the time of their separation. Appellee's unmarried brother, Eldon Wilson, had lived with his sister prior to her marriage and remained and lived with appellee and appellant after the marriage, paying them for his board. Before said marriage appellant had been well acquainted with Aelit Aelits, aged sixty-seven, and later met his wife, Augusta Aelits, aged forty-eight years, after his marriage. The Aelits had children and grandchildren living in Lincoln, and from all of the testimony seemed to be an affectionate and loving couple.

Appellant had been a farmer and had known them when they lived upon a farm and had visited them before his marriage in Lincoln. Appellant was the owner of a store building in Lincoln, which rented for forty dollars per month. He had no other property.

The case stated by appellee as strongly as could be inferred from the testimony is as follows: "That appellant and appellee resided in Lincoln, Illinois, after their marriage, living in the house owned by appellee, which was the same home in which appellee and her bachelor brother, Eldon Wilson, had lived since the death of their mother. Eldon Wilson continued to live with appellant and appellee after their marriage, paying five dollars a week for his board and in addition thereto he furnished the coal for the home. Appellee had lived in Lincoln all her life and the appellant had resided in Lincoln for only the past seven years. Appellant and his first wife were divorced. Appellee had never been married before her marriage to appellant. It appears from the evidence in this case that the appellant was not employed at any regular employment. Prior to the marriage of the appellee to the appellant, appellee had sewed for a living and continued to do some sewing after her marriage.

"Appellant became acquainted with Mrs. Augusta Aeilts, wife of Aeilt Aeilts, on the day of the city election in Lincoln in the month of April, 1925. The proof in this case shows that the appellant drove his Ford touring car on that day for Mr. Engle, who was a candidate for mayor; that Mrs. Aeilts was a woman worker for this same candidate and that appellant and Mrs. Aeilts worked together on this occasion; that this acquaintanceship continued throughout the spring and summer of 1925. Mrs. Aeilts, it appears from the evidence, is about forty-eight years old and her husband, Aeilt Aeilts, is about sixty-seven years old. Mrs. Aeilts and appellant were seen together many times during the spring and summer of 1925. Appellant spent much of his time at the home of

Mrs. Aeilts, assisted her in picking strawberries, for which services Mrs. Aeilts gave appellant half a crate of strawberries. It seems appellant was anxious to help and accommodate Mrs. Aeilts in all ways and resented appellee's attitude in not wanting to spend much time with Mr. and Mrs. Aeilts. It appears from the evidence that during the spring and summer of 1925 these two couples visited back and forth at each other's homes for the purpose of playing Flinch, but that these meetings were suggested and planned by appellant and Mrs. Aeilts and not by appellee.

"Appellant owned a Ford touring car and on Wednesday evenings during the spring and summer of 1925 in the company of Mrs. Aeilts would take appellee to her church for the Wednesday evening services and then appellant would call for appellee at the conclusion of these services and on the return home would drive his car past the home of Mrs. Aeilts and would honk his horn.

"In the summer of 1925 appellant on many occasions took Mrs. Aeilts alone in his car, as appellant, appellee and Mrs. Aeilts testified, for the purpose of appellant teaching her how to drive. It appears from the evidence that a son of Mrs. Aeilts, who lived with his parents, owned a Ford car, but that she never operated the Ford car of her son even after receiving her lessons from appellant. Willis Schaff, a witness in this case, testified that he lived across the street west from the home of Mrs. Aeilts and that during the summer of 1925 he saw appellant drive his car to the side of the Aeilts' house and go into the house; that he saw appellant talk to Mrs. Aeilts in the yard, saw Mrs. Aeilts get in the car of appellant and drive away in the car with appellant. Appellant at all times stated that he just wanted to be good neighbors with Mr. and Mrs. Aeilts. These two families lived four blocks from each other, as shown by the evidence. Appellee testified that she never visited Mrs. Aeilts alone or invited Mrs. Aeilts to visit in her home.

“Appellant admitted to appellee that he took Mrs. Aeilts to the dental office of Dr. Zanglein in Lincoln, because Mrs. Aeilts sent word to appellant by her husband that she wanted appellant to be with her when she was getting her teeth filled. Appellee suggested that Mrs. Aeilts take her own husband, but appellant said, ‘She has got no use for him.’ It appears from the evidence that Dr. Zanglein was in the South at the time of the hearing in this cause.

“Mrs. Aeilts, it appears from the evidence, was employed as a janitress in the Court House in Lincoln in the spring of 1926 and on one occasion about six thirty in the morning appellant was found by the witness Louis Evans in the private office of the County Treasurer in said Court House. Mrs. Aeilts was not in this room at that time, but came in a few minutes after appellant went out. The witness Fred Martin, janitor at the Court House, testified that in May, 1926, about twelve thirty in the afternoon he saw appellant come out of the G. A. R. room on the first floor of said Court House. Mrs. Aeilts was in the G. A. R. room and was employed as janitress in the Court House at that time. Jasper Albright was sheriff of Logan County during the summer of 1926, and it appears from the evidence that he inquired of appellant what he was doing in the Treasurer’s room. Appellant said he had business with the lady janitor, ‘PRIVATE BUSINESS,’ and on refusal of appellant to explain to the sheriff appellant was ordered to stay out of the Court House; that Lucy Riley, an automobile insurance agent, with her office directly east from the Court House, saw appellant pass her office occasionally and walk toward the Court House; that she saw appellant talk to Mrs. Aeilts and that sometimes she was on the steps of the Court House and sometimes in the building.

“It appears from the evidence that appellee spent most of her time at home. She did all her own housework including the mending and sewing of appellant’s clothes; that prior to the spring of

1925 she and appellant had had no quarrels and that she did not quarrel with him even after the spring of 1925, but after appellant, began to go with Mrs. Aeilts he was nagging appellee all the time and stated that appellee hurt Mrs. Aeilts' feelings. Appellee heard appellant in a conversation over the telephone in the summer of 1925 with Mrs. Aeilts, state to Mrs. Aeilts: 'Is he gone, are you lonesome? do you want me to come up?' So he got his hat and came out in the yard to where appellee was and said he was going up to talk to Mrs. Aeilts a little bit. Appellant refused to perform his usual marital obligations with appellee commencing in June, 1925.

"The bill of complaint did not charge adultery, but did charge intimacy of the appellant with Augusta Aeilts, and that appellant refused to give up his unlawful relations with her; that the appellant, associating on terms of intimacy with Augusta Aeilts, caused appellee mental anguish and distress. It was charged that appellant lost his love for appellee and the evidence clearly shows this to be the truth, and that her married life was rendered miserable because of appellant's conduct toward her."

Certain portions of this testimony were vigorously denied, especially the telephone conversation by appellant in the summer of 1925, matters that took place at the Court House and the relationship between appellee and Mrs. Aeilts. It appears from all the proofs that appellant and appellee and Mr. and Mrs. Aeilts as families were very intimate. They visited in each other's homes and played cards together usually twice a week, first playing at one home and then at the other. The two families had arranged to attend a barbecue together on Wednesday, September 30, 1926, the day of the separation, but it rained so that they could not go. On the previous Saturday evening and again on Monday evening they had played Flinch together, one evening at one home and the other evening at the other, and appellee had been very cordial and in-

vited Mrs. Aelits to call again. A son of Mr. and Mrs. Aelits had a Ford car but he worked away from home. At the request of Mr. Aelits, appellant had instructed Mrs. Aelits how to run a car and had taken his car and driven Mrs. Aelits to a dentist. The testimony further shows that appellant and appellee frequently on Sundays, with appellant's car, stopped for the Aelits and took them to their church and called for them after church and took them home. Appellant did pick strawberries at one time at the Aelits and took part of a basket home. The testimony is profuse that appellant never went to the home of the Aelits clandestinely or without talking it over with appellee, and the record is bare that any of these visits ever caused appellee any pain, suffering or embarrassment while they were being carried on, or that appellee ever made any objection.

The ground for trouble seems to have been laid in the spring of 1925. Eldon Wilson was the Precinct Committeeman and hired the workers in the city election for mayor. He employed appellant with his car, without pay, and hired Mrs. Aelits to ride with him, paying her ten dollars for the day's work. After this there seems to have been occasional ripples of trouble. Nothing more serious, however, than that appellant went to the home of the Aelits when Mr. Aelits was there, spoke to Mrs. Aelits in the Court House and the two families played Flinch together for an evening less than forty-eight hours before the break occurred. On the evening of September 30, 1926, appellee testified that she told appellant to leave. Appellant's version of the separation is as follows:

"The day she ordered me to leave we had arranged to go to the Chautauqua grounds to the barbecue and it rained all day and after dinner I said to Ella, 'I believe I will go down to Aelits and tell them that it is too wet to go tonight and I will get some tobacco.' She didn't say anything. So I took the umbrella and went and Mr. and Mrs. Aelits were both at home and I stayed and

talked about an hour with them, and went across to Willis Schaff's store and got some tobacco and bought a pumpkin and took it home. Thought I would have some pumpkin pies, but I never got them. Ella was gone. I read a while and took a nap and she got home about five o'clock. I asked her where she had been and she said, 'I have been getting some advice,' and I said, 'I hope you have good advice,' and she said she thought she did. Eldon came home and we had supper and after supper I put on a big apron to wipe the dishes and she said, 'I will tend to the dishes tonight.' I said, 'I will help you,' and she said, 'this will be the last time.' I went ahead and after I got through and when she came in Eldon was in the front part of the house and she says, 'Eldon you tell him.' And Eldon said, 'we want you to get your clothes and get out of here.' I looked around at Ella and said, 'Ella, is that your honest wish,' and she said 'yes,' and she came about half way crossing over here, and I says, 'Ella, if you are in earnest and mean it, come back and help me get them and I will get out if you want me to,' and Eldon says, 'Don't talk to him, come on, if he don't get out the sheriff will get him out.' "

There was some testimony that appellant refused to perform his marriage duties after June, 1925, and ceased to have any affection or regard for appellee, of which she complained. The testimony of appellant, corroborated by Dr. Branom, shows that in June, 1925, appellant was in a run down condition physically, that he had bad teeth and that the doctor treated him by giving him tonics and injected iron and arsenic in the vein of the arm. The doctor testified fully to this condition on the part of appellant and gave his opinion in regard to it.

Does the testimony show that appellee is living separate and apart from her husband without fault on her part? Separate maintenance is a statutory remedy, in derogation of the common law, and the court is without jurisdiction to decree it except where the proof brings the complainant strictly within the law, nothing

by way of intendment being presumed. (**Raab v. Raab**, 150 Ill. App. 558; **Johnson v. Johnson**, 125 Ill. 515; **Wasson v. Wasson**, 236 Ill. App. 508.)

Before the court can decree separate maintenance to the wife, the preponderance of the evidence must show; first, that the conduct of the husband is such as directly to endanger the life, person or health of the wife; or, second, that the husband pursues a persistent, unjustifiable and wrongful course of conduct toward the wife, which will necessarily and inevitably render her life miserable and living with him as his wife, unendurable. (**Johnson v. Johnson**, 125 Ill. 515; **Raab v. Raab**, 150 App. 558; **Wasson v. Wasson**, 236 App. 508; **French v. French**, 302 Ill. 161.) In **French v. French**, *supra*, it was held: "It is true that incompatibility of disposition, slight moral obliquities, occasional ebullitions of passion or trivial difficulties will not justify separation, but where the husband pursues a persistent, unjustifiable and wrongful course of conduct toward his wife, which will necessarily and inevitably render her life miserable and living with him as his wife unendurable, she is not bound to live and cohabit with him as her husband, and living separate and apart from him, under such circumstances, is without her fault within the meaning of the statute."

We do not think the testimony in this case shows that appellee is living separate and apart from her husband without her fault. There is no proof that appellant ever addressed an unkind word to appellee. The term "nagging" is used, but not a syllable is testified to as to what appellant said. Appellee makes no specific charge of an illicit relation between appellant and Mrs. Aelits, or does the testimony show that they had any regard for each other different from that friendly relation which elderly people acquire by association. There is no testimony that appellant ever did anything for Mrs. Aelits except when he was requested to do it by Mr. Aelits. Appellee, knowing all that took place

between them, joined in the association, had Mr. and Mrs. Aelits at her home and played cards with them, visited their home with appellant but two or three days before the separation, and on the very day of the separation was to have joined with the Aelits in attending a barbecue and was prevented only by rain. There is no testimony that appellee ever requested her husband to drop the society of the Aelits or that she ever stated to him that she suspected there was anything wrong about that of which she does not even make a charge. If it was an offense for appellant to associate with the Aelits, appellee was guilty of the same offense. If appellant's association with the Aelits was offensive to appellee in any way, under the proofs in this case it was the duty of appellee to notify her husband before turning him out of house and home. The trouble, however, seems to have originated more with the brother of appellee, Eldon Wilson, who was her adviser. He had occupied the home from the time of his mother's death and was called upon by appellee to state to appellant the nature of his sister's wilted affections.

The testimony, by a very great preponderance, fails to show that appellee is living separate and apart from her husband, without any fault on her part, and the decree of the Circuit Court of Logan County should be reversed.

Reversed.

6752a

249 I.A. 660²

General No. 8162

Agenda No. 29

Lilla M. Solomon, Plaintiff in Error,

vs.

Edward C. Solomon, Defendant in Error.

Appeal to Sangamon.

NIEHAUS, J.

In this case Lilla M. Solomon filed a bill for separate maintenance in the circuit court of Sangamon county against Edward C. Solomon her husband, alleging that her husband had wilfully deserted her; and that she was then living separate and apart from him without her fault; and praying for an order of the court for separate maintenance. The bill was afterwards amended; one amendment being an allegation that the complainant feared and had reason to fear, that unless an injunction issue, that the defendant would encumber or alienate his property; and praying for an injunction. A temporary injunction was ordered and issued on the amended bill against the defendant. The defendant afterwards made a motion to dissolve the temporary injunction, and there was a hearing thereon; and the matter was taken under advisement. The complainant also filed a petition for alimony pendente lite; and for the allowance of suit money and solicitor's fees. Upon hearing the evidence on this petition, the court entered an order denying the prayer of complainant's petition for alimony pendente lite; but made

an allowance for solicitor's fees for her solicitor in the sum of \$500.00. From this order the defendant prayed an appeal; and the complainant prayed an appeal from the order denying alimony pendente lite and the dissolution of the temporary injunction. The defendant perfected his appeal; but the matters involved in the appeal of the complainant are brought before this court by writ of error; and the parties have stipulated, that inasmuch as all the matters are parts of the same order of the court and included in the same case, that they be consolidated and heard in this court as one case. In this condition of the record, we shall consider first the matters pending concerning the denial of alimony pendente lite and the dissolution of the temporary injunction. It is sufficient to say concerning the dissolution of the temporary injunction, that a hearing was had upon the defendant's motion to dissolve the injunction, and no certificate of evidence appears in the record of what was presented to the court in support of or against the granting of the motion. This court must therefore presume that there was a sufficient showing made to justify the court in granting defendant's motion for the dissolution of the injunction; and for the reason stated, that this court is not in position to review the action of the court in that regard. The denial of the alimony pendente lite, raises the question whether there

was an abuse of discretion vested in the court concerning this matter. The statute empowers the court to make an order for the support of the wife which may be reasonable and just during the pendency of the suit; and the evidence shows, that the defendant had prior to the filing of the bill already made provision for his wife by turning over to her, stocks and bonds and property from which she realized an income of from \$2400.00 to \$2700.00. The complainant admitted that her income from this source amounted to at least \$200.00 a month. It is clear, that the court reached the conclusion after hearing the evidence, that the income which the defendant had already provided was sufficient to suitably support her during the pendency of the suit; and that there was no occasion to make any additional allowance for that purpose. **Decker v. Decker**, 279 Ill. 300; **Gilbert v. Gilbert**, 305 Ill. 216. We cannot say, that the court erred in the exercise of its sound discretion in this matter. With reference to the allowance of solicitor's fees, it is contended there was no evidence heard by the court to show that the sum allowed was the usual and customary fee for the services of the solicitors. It may be pointed out concerning this contention that where the amount allowed can be regarded as merely a nominal fee, no proof of the reasonableness of the allowance is necessary; but in a

case where the amount of the allowance is more, or substantial in character the rule is, that the reasonableness of the amount must be established by proof to show, that the allowance is the usual and customary fee for the services of the solicitors; and the proof must be preserved in a certificate of evidence; or the decree must find that such evidence was in fact introduced; and that upon a consideration thereof, the court found such fees to be reasonable and the customary and usual fees for the solicitor's services. No evidence was taken in this case; and there is no finding in the decree to show that the amount allowed was based on evidence. **McMullen v. Reynolds**, 209 Ill. 504; **Gehlbach v. Gehlbach**, 219 Ill. App. 503; **Kingman v. Kingman**, 150 Ill. App. 462.

For the reasons stated, the order denying the complainant alimony pendente lite, and the order dissolving the injunction, is affirmed; and the order allowing \$500.00 solicitor's fees is reversed and the cause remanded for further proceedings in that regard consistent with this opinion.

Affirmed in part, reversed in part and remanded.

6753a

249 I.A. 660³

General No. 8168

Agenda No. 35

Wilbur Green, Appellant.

vs.

The People, Ex Rel, Helen Groce, Appellee.

Appeal from county court Scott County.

NIEHAUS, J.

In this case Helen Groce, a young unmarried woman, made complaint against Wilbur Green the appellant, charging him with being the father of her bastard child. Upon the trial of the case in the county court of Scott county, the appellant was found guilty by verdict of the jury, and a judgment was entered by the court upon the verdict. This appeal is prosecuted from the judgment.

The appellant denied on the trial that he had had any sexual relations with the complaining witness; and two witnesses were called on behalf of the appellant, namely, Charles E. Thady, sheriff of Scott county; and Dr. R. R. Jones, a practicing physician in Winchester, who had rendered services to the complaining witness when the child in question was born. These witnesses testified that the prosecuting witness made a statement to each of them to the effect that a married man by the name of King residing in Jacksonville, was responsible for her condition; and was the father of her child. And the prosecuting witness denied, that she made the statements testified

to by these witnesses. Another feature in the trial of the case was, that a private investigator or detective by the name of T. P. Sullivan gave testimony for the appellant. Concerning these matters the court gave the following instructions:

7. The Court instructs the jury that, in considering the testimony of any private investigator or detective, and in determining its degree of credibility, and the weight, they shall give to such testimony, they have a right to take into consideration that he is a private investigator or detective, and that fact should be taken into consideration by the jury and given such effect in determining the credibility of such investigator or detective as the jury, after fair and candid deliberation, think it should have, but the weight it should have is to be determined by the jury as a matter of fact. Such evidence is subject to suspicion and should be considered by the jury with great caution; but if after considering such evidence fairly in connection with all the other evidence you find it worthy of credit you should give it such weight as you find it entitled to.

8. The Court instructs the jury that evidence of oral admissions or statements should be carefully scrutinized and given only such weight as the jury, in the light of all the facts and circumstances in evidence in the case, determine such evidence is entitled to.

It will be noticed that by Instruction 7 the court told the jury with reference to the credibility of a private investigator or detective as a witness, they should take such fact into consideration, and that such fact should be given such an effect in determining the credibility of such investigator or detective as the jury, after a fair and candid deliberation, thought it should have; and that such evidence is subject to suspicion and should be considered by the jury with great caution. This instruction was erroneous and has been

repeatedly condemned. **Hronek v. People** 134 Ill. 139; **People v. Campbell** 134 Ill. 391; **People v. Newbold** 260 Ill. 196; **People v. Gardt** 258 Ill. 468. In the Newbold case above cited, the court says in reference to a similar instruction "it is not a rule of law, that the testimony of informers and detectives must be weighed with greater care than that of other witnesses. The fact that they are informers and detectives, or otherwise interested, should be taken into consideration and given such effect in determining their credibility as the jury, after fair and candid deliberation, think it should have, but the weight it should have is to be determined by the jury as a matter of fact, and not under a legal rule of comparison with other witnesses."

The eighth instruction above set out is also erroneous because it had a tendency to mislead the jury into thinking that oral admissions or statements are subject to suspicion; and should therefore be carefully scrutinized, and that they should only be given such weight as the jury in the light of all the facts and circumstances in evidence should determine. In **Lyons v. Chicago City Ry Co.** 258 Ill. 75, the court said: "While it may be proper to enumerate elements which the jury may consider, an instruction which tell them

they must or should consider is liable to be misleading. On the trial of the case the court should leave the jury perfectly free and untrammelled to pass upon the credibility of the witnesses, determining for themselves the weight to be given to the testimony. It is not the province of the court to tell the jury in any case what evidence is the strongest."

For the errors indicated, the judgment is reversed and the cause remanded.

Reversed and remanded.

MODIFIED AND REFILED.

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

OCTOBER TERM, A. D. 1927.

TERM NO. 62.

AGENDA NO. 32.

TENNIE GLASCO,
Appellee,

VS.

CALVIN CARAKER and MYRTLE YATES,
Appellants.

249 I.A. 661

APPEAL FROM THE CIRCUIT
COURT OF
UNION COUNTY.

NEWHALL, J. This suit was originally brought before a Justice of the Peace to recover damages for the destruction and conversion of a fence.

On appeal to the Circuit Court the jury was waived, and the Court entered judgment for \$35.00 against appellants.

The proof on the part of appellee showed that appellee was the owner and in possession of a certain ^{east} three acre tract of land lying ~~west~~ of a lane or highway, which divided the land owned by the respective parties to this litigation. The lane had been used in its present condition for more than twenty years, and, during this time, appellee and her husband had been in continuous possession. About twenty years ago the husband of appellee erected the fence in controversy along the west side of the said land, and prior thereto a rail fence had been maintained for many years.

In 1926, appellants, claiming that the fence was not properly located on the highway line, destroyed the fence posts and carried away the wire fence, which by appellee's evidence was shown to be worth \$50.00.

Appellants say that the point of contention in this case is the correct location of the east line of the lane or highway, and that, if it encroached upon the highway line, appellants had a right to destroy it.

Appellants offered evidence tending to show that, when the present fence in controversy was constructed nearly fifteen years ago, the same was built out into the lane, the boundary of which had been defined by an old rail fence for many years.

The abstracted record does not show that the bill of exceptions contains all the evidence that was heard on the trial, and a court of review, under such circumstances, is not bound to examine the record to determine whether or not the evidence appearing supports the finding or judgment. (Cogshall v. Beesley, 76 Ill. 445; Steffy v. Sandifer, 202 Ill. App. 604.)

But, notwithstanding this state of the record, we have examined the evidence that was abstracted, and, after consideration thereof, are of the opinion that the judgment of the Court below is supported by the greater weight of the evidence, and the judgment of the trial court is accordingly affirmed.

AFFIRMED.

Not to be reported.



STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

OCTOBER TERM, A. D. 1927.

TERM NO. 62.

AGENDA NO. 32.

TENNIE GLASCO,
Appellee,

VS.

CALVIN CARAKER and MYRTLE YATES,
Appellants.

:

:

:

:

APPEAL FROM THE CIRCUIT
COURT OF
UNION COUNTY.

NEWHALL, J. This suit was originally brought before a Justice of the Peace to recover damages for the destruction and and conversion of a fence.

On appeal to the Circuit Court the jury was waived, and the Court entered judgment for \$35.00 against appellants.

The proof on the part of appellee showed that appellee was the owner and in possession of a certain three acre tract of land lying west of a lane or highway, which divided the land owned by the respective parties to this litigation. The lane had been used in its present condition for more than twenty years, and, during this time, appellee and her husband had been in continuous possession. About twenty years ago the husband of appellee erected the fence in controversy along the west side of the said land, and prior there-to a rail fence had been maintained for many years.

In 1926, appellants, claiming that the fence was not properly located on the highway line, destroyed the fence posts and carried away the wire fence, which by appellee's evidence was shown to be worth \$50.00.

Appellants say that the point of contention in this case is the correct location of the east line of the lane or highway, and that, if it encroached upon the highway line, appellants had a right to destroy it.

Appellants offered evidence tending to show that, when the present fence in controversy was constructed nearly fifteen years ago, the same was built out into the lane, the boundary of which had been defined by an old rail fence for many years.

The abstracted record does not show that the bill of exceptions contains all the evidence that was heard on the trial, and a court of review, under such circumstances, is not bound to examine the record to determine whether or not the evidence appearing supports the finding or judgment. (Cogshall v. Beesley, 76 Ill. 445; Steffy v. Sandifer, 202 Ill. App. 604.)

But, notwithstanding this state of the record, we have examined the evidence that was abstracted, and, after consideration thereof, are of the opinion that the judgment of the Court below is supported by the greater weight of the evidence, and the judgment of the trial court is accordingly affirmed.

AFFIRMED.

Not to be reported.

IN THE
APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT
FEBRUARY TERM, A. D. 1928.

249 I.A. 662

TERM NO. 10.

AGENDA NO. 4.

DAN JONES, :
Appellee, :
VS. : APPEAL FROM THE CITY
MARLOW PARK CORPORATION, :
Appellant. : COURT OF HERRIN, ILLINOIS.

BARRY, P. J.

Appellee averred in his declaration that on the evening of June 12, 1926, he was a patron of appellant at its skating rink; that appellant negligently failed to keep the floor of the skating rink in a reasonably safe condition and allowed the same to become rough and uneven; that having purchased a ticket for the privilege he was skating upon the floor of the rink and was then and there in the exercise of due care and caution for his own safety and that by reason of appellant's negligence he fell and received injuries. The trial resulted in a verdict and judgment for \$1475.00.

Appellee made no claim in his declaration for medical expenses. The doctor who attended him was called by appellee as a witness. Counsel for appellee asked the doctor what he drew for his services and the doctor replied that he had received \$30.00. Counsel for appellee then asked him who paid it. Appellant objected and the objection was overruled and the witness was allowed to answer that George Otey brought a check signed by the United States Guaranty and Fidelity Company of Baltimore. The answer was objected to and a motion made to strike it and the objection and motion were overruled. Counsel then asked the

doctor if it was not a fact that it was the United States Fidelity and Guaranty Company instead of the Guaranty and Fidelity Company. An objection to the question was overruled and the answer was that it was the United States Fidelity and Guaranty Company. A motion to strike the answer was overruled.

The testimony was highly calculated to inform the jury that appellant was insured. It was wholly foreign to any issue in the case and was highly prejudicial. It could serve no other purpose than to influence the jury. A jury is inclined to be more liberal if they are advised that a defendant is insured. In the case at bar the verdict is, to say the least, if not excessive. The evidence was close. The admission of the testimony above referred to must be held to be reversible error; *Eldorado Coal & Coke Co., v. Swan*, 227 Ill. 586. This Court and the Supreme Court have frequently held that such testimony should not be admitted.

The second and fifth instructions given on behalf of appellee did not require the jury to find that appellee was in the exercise of ordinary care for his own safety, and the fifth instruction did not require the jury to find that appellee was injured by reason of appellant's negligence. Each of these instructions directed a verdict in favor of appellee.

Appellee's fifth and seventh given instructions were to the effect that if the jury believed from the evidence that appellant was guilty in manner and form as alleged in the declaration or some count thereof, etc., then the jury should find in favor of appellee. In *Bernier v. I.C.R.R.Co.*, 296 Ill. 264 the Supreme Court said:- "We have repeatedly held that the Court should not give a peremptory instruction to find for the plaintiff if the jury should find that he had proved his case as alleged in the declaration, and further, that it is the duty of the Court to define the issues to the jury without referring them to the pleadings to ascertain what they are."

Because of the errors aforesaid, the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Not to be reported in full.

6828a
IN THE
APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT

FEBRUARY TERM, A. D. 1928

FILED
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CLERK OF THE COURT
249 I.A. 662²

TERM NO. 20.

AGENDA NO. 8.

C. BUTKUS, :
Appellant, :
VS. : APPEAL FROM THE CIRCUIT
FRANKLIN COUNTY COAL COMPANY, : COURT OF WILLIAMSON COUNTY.
et al., :
Appellees. :

BARRY, P. J.

At the present term of this court we filed an opinion in Term No. 19, Corcoran vs. Franklin County Coal Company, et al. The questions presented and passed upon in that case are identical with those raised in this case with the exception that the sixth plea in this case sets out a covenant in appellant's deed which more fully and expressly releases all liability for damages to the surface of his lot. Our conclusions in the Corcoran case are controlling in this case.

The judgment is reversed and the cause remanded with directions to sustain the demurrers to the sixth and seventh pleas.

REVERSED AND REMANDED.

Not to be reported.

6829a
IN THE
APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT

249 I.A. 662³

FEBRUARY TERM, A. D. 1928.

TERM NO. 21.

AGENDA NO. 16.

COOK BROTHERS, et al., :
Appellees, :
VS. : APPEAL FROM THE CIRCUIT
H. E. KIMMEL, et al., :
Appellants. : COURT OF FRANKLIN COUNTY.

BARRY, P. J.

Cook Brothers filed a bill in the nature of a creditors bill in aid of execution to set aside certain deeds executed by Vincent D. Lewis, appellant, to H. E. Kimmel, appellant, alleged to have been made in fraud of their rights as a creditor of Vincent D. Lewis. The bill averred that in vacation during the February Term of the Franklin Circuit Court in 1926, they recovered a judgment against the said Lewis in the sum of \$213.52; that the said conveyance was a mere sham made with the intent of defrauding complainants and other creditors and was made without consideration, etc. W. H. Lewis filed a cross bill in which he averred that on August 27, 1927, he recovered a judgment against the said Vincent D. Lewis in the sum of \$262.80. The cross bill contained substantially the same averments as the original bill. A decree was rendered in favor of the complainant and cross complainant, but the Court having found that the conveyances were not fraudulent in fact, it was provided that H. E. Kimmel should be reimbursed out of the first proceeds of the sale of the premises to the amount of \$1630.05.

Vincent D. Lewis and H. E. Kimmel perfected an appeal and insist that for several reasons the decree should be reversed. Their first contention is that there was no proof offered to show

that the said Lewis was indebted to Cook Brothers and W. H. Lewis at the time the conveyances were made. Vincent D. Lewis was called as a witness and testified that he knew he was indebted to those parties before he made the conveyances to Kimmel. He also said that he told Kimmel he was borrowing the money to help settle the estate of his father. W. H. Lewis testified that the judgment against Vincent D. Lewis involved money due him on the settlement of his father's estate which was settled in February 1925. There is sufficient evidence in the record to show that the indebtedness existed at and prior to the time the conveyances were made to Kimmel which was in the fall of 1925.

Appellants contend that there was no proof offered as to the recovery of the judgments. Appellants filed joint answers to the bill and cross bill. In their answer to the bill they averred that they are reliably informed and believed that on May 11, 1926, Cook Brothers procured a judgment by confession in the Circuit Court of Franklin County against Vincent D. Lewis for \$213.52. In their answer to the cross bill they admitted that the alleged judgment of W. H. Lewis was procured in August 1927. There is no force in their contention that the judgments were not proven. They argue that the bill cannot be maintained because no execution was returned "No property found". A bill to set aside, in aid of complainant's execution, an alleged fraudulent conveyance, need not allege that an execution had been returned "no property found" *Andrews v. Donnerstag*, 171 Ill. 329. They insist that the judgments in question were not a lien on the real estate at the time it was conveyed to Kimmel. If the judgments had been a lien at that time it would have been wholly unnecessary for the judgment creditors to come into a Court of equity. Even though the judgments were not a lien, yet the judgment creditors had a right to ask a court of equity to set aside the conveyances alleged to have been made in fraud of their rights in aid of their executions.

Appellants insist that Kimmel is a bona fide purchaser for value and that the Court erred in setting aside the conveyances. The undisputed evidence is that the deeds were absolute in form but intended merely as security for a debt. Appellants contend that such a transaction is not void as to the grantor's creditors unless there was actual fraud in which both grantor and grantee participated as such a transaction is not one where the law implies fraud. They rely upon *Hutchison v. Page*, 246 Ill. 71; the Court so held in that case. Prior to that decision, however, the Courts had uniformly held that a conveyance of property which is absolute on its face, but which is intended merely as security, is fraudulent and void as to creditors. The following are a few of the cases which so hold:- *Beidler v. Crane*, 135 Ill. 92; *Best v. Fuller & Fuller Co.*, 185 Ill. 43; *Clark v. Harper*, 215 Ill. 24. That rule was clearly recognized as the true rule in cases decided since the *Hutchison* case, supra; *Woodworth v. Buck & Co.*, 289 Ill. 579; *Hayes v. Miniter*, 308 Ill. 22.

In the latter case the Court, on page 27, said:- "The rule is established in this State that a conveyance of property which is absolute upon its face but which is really intended as a mortgage or security is binding as between the parties but is fraudulent as to creditors, even though the grantee or mortgagee did not actually participate in the intent of the grantor or mortgagor to defraud his creditors."

Appellants insist that about ten days before Cook Brothers procured their judgment, and something more than a year before W. H. Lewis procured his, they made an agreement between themselves that appellant Lewis, would release his equity in the lands conveyed to Kimmel as security in 1925 for a consideration of \$700.00, and that Kimmel contracted to convey to Lewis land in Perry County upon the payment of \$900.00. At that time it appears that Lewis was indebted to Kimmel in the sum of \$1600.00, which sum was secured by the deeds made in 1925. Kimmel released

land in Perry County upon payment of \$900.00. Nothing was filed for record to evidence that alleged transaction. The original conveyances were fraudulent as to creditors because of the secret agreement between appellants that the deeds altho absolute in form were merely intended as security. We are of the opinion that appellant could not purge the original conveyances of their fraudulent character by making another secret agreement, Tyler v. Tyler, 126 Ill. 525.

Appellants finally contend that the Court erred in ordering the conveyances set aside without providing that Kimmel should be given an opportunity to pay the judgments before the deeds were set aside. The errors assigned upon the record are assigned jointly by appellants. As assignment of errors is regarded as a declaration and each assignment as a count of a declaration, and where parties join in assigning errors, errors assigned must be good as to all appellants or they will not be good as to any, and if the errors complained of do not affect all the appellants the assignments of such errors must be several and not joint, Hawkins v. County of Lake, 303 Ill. 624.

We find no merit in any of the contentions relied upon by appellants for a reversal of the decree. The decree is

AFFIRMED.

Not to be reported.

6755a

STATE OF ILLINOIS.
APPELLATE COURT.
FOURTH DISTRICT.

FILED
JAN 2 1928
CLERK OF THE COURT
FOURTH DISTRICT

FEBRUARY TERM , A. D. 1928.

249 I.A. 662⁴

TERM NO. 26.

AGENDA NO. 19.

J. B. REIS LUMBER CO.,)
Appellee.)
VS.)
OTTO LINDOW,)
Appellant.)

APPEAL FROM THE CIRCUIT COURT
OF
ST. CLAIR COUNTY.

Barry, P. J. - In an action of assumpsit appellee recovered a verdict and judgment for \$3,000.00 on the theory that it had sold and delivered to appellant lumber and materials amounting to that sum. The evidence is sufficient to warrant the jury in finding that the lumber and materials were sold to appellant. He was interested in the St. Clair Park Association and desired to purchase lumber and materials from appellee for the said association to the amount of about \$3,000.00. The testimony on the part of appellee is to the effect that it refused to sell any lumber and materials on the credit of the Park Association, but that appellant was informed that his credit was good and if he made the purchase they would fill his orders. Thereafter appellee delivered lumber and materials to the amount of \$4,130.92, and a payment of \$1,000.00 was afterwards made by the Park Association.

Appellee filed a mechanics lien for \$4,130.92 against the property of the Park Association. A decree was rendered in favor of appellee and other lien holders and the premises of the Park Association were sold, under the decree,

to appellee and others for the sum of \$15,000.00. Thereupon appellee gave the Master in Chancery its receipt for its pro rata share, to-wit: \$2,076.28. In addition to that amount the Park Association, in the meantime, had paid appellee \$1,000.00, so that appellee was paid in all the sum of \$3,076.28 on its claim of \$4,130.92, leaving a balance due of \$1,054.64.

Upon the trial of the case at bar appellant called the Master in Chancery who conducted the sale in the mechanics lien proceeding and offered to prove that appellee and others purchased the premises of the Park Association for the sum of \$15,000.00 and that appellee had given the Master receipts for \$2,076.28, its pro rata share of the proceeds of the said sale. The court refused to receive that evidence. It was competent evidence and the court erred in its ruling.

Appellant agreed that if appellee should see fit to do so, it might file a mechanics lien against the St. Clair Park Association on account of lumber and materials delivered to the Park property without prejudice to any demand appellee might have or claim to have against him, and without prejudice to any defense appellant might have in any demand appellee might claim against him. It will be observed that there was nothing in that agreement in regard to appellee becoming the purchaser or joint purchaser of the property of the Park Association. It was simply an agreement that if appellee filed a mechanics lien against the Park Association it was to be without prejudice to either party in their respective claims with reference to the liability of appellant. If a stranger had purchased the property of the Park Association for \$15,000.00, appellee's share of the proceeds of that sale would have been \$2,076.28, and that amount would have been a credit upon its claim against appellant.

Appellee saw fit to become a co-purchaser of the premises with others and no doubt holds a certificate of purchase. If redemption is made appellee will receive its ratable proportion of the redemption money. If no redemption is made a deed will be issued to the purchasers and appellee will receive its proportionate share of the title to the land.

Appellee says that if it had received any satisfaction out of the property of the Park Association appellant can set that off against this judgment when the proper time arrives.; that it is only entitled to one satisfaction either under the mechanics lien suit, or its claim against appellant, but that it had received neither. We cannot agree with that contention. What appellee did amounts to a payment of \$2,076.28. If appellee will file a remittitur of all of its judgment over and above \$1,054.64, in this Court within twenty (20) days from the filing of this opinion, the judgment will be affirmed for \$1, 054.64, otherwise the judgment will be reversed and the cause will at the costs of appellee. If a remittitur is filed as aforesaid, then appellant will pay one-third of the costs, and appellee two-thirds thereof.

not to be reported.

6756a

STATE OF ILLINOIS.
APPELLATE COURT,
FOURTH DISTRICT.

FILED

JUN 1 1929

Robert B. Rice
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT

FEBRUARY TERM A. D. 1929

249 I.A. 662⁵

TERM NO. 8.

AGENDA NO.14.

| | | |
|----------------|---|-------------------------------|
| JAMES WEBB, | } | APPEAL FROM THE CIRCUIT COURT |
| Appellee. | | |
| VS. | | |
| J. V. DILLMAN, | } | CLAY COUNTY. |
| Appellant. | | |

Newhall, J.- Appellee brought suit against appellant for the recovery of alleged damages by reason of an automobile collision on the public highway.

The fifth and sixth counts of the declaration, upon which the case was tried, alleged that appellee was injured by reason of the careless and negligent management of appellant's car, which was being operated by his servant and agent, one William Parton.

A plea of the general issue was filed, and, after trial before a jury, a verdict of \$525.00 was rendered. Motions for a new trial and arrest of judgment were made, overruled and excepted to, and judgment entered on the verdict.

The principal contention of appellant is that the automobile was not operated by appellant himself, but was driven by Parton without appellant's authority, knowledge or consent, and that Parton was not such a servant, employee, or agent of appellant as would make him liable for the wrongful act of Parton.

The evidence showed that on the evening of December 31, 1925, appellee, with his wife and child, was driving south on the hard road about four miles from the

Village of Flora, and, running out of gasoline, his car stopped on the right side of the pavement; that he alighted from the car, and, while in the act of pushing the car from the pavement, his car was struck from the rear by appellant's car, then being driven by William Parton. Both cars were damaged, and appellee sustained bruises which prevented him from working for several days after the accident.

Appellant was by profession a doctor, residing in Louisville, and sometime in November, 1925, he had made arrangements with William Parton to store his car for the winter with Parton, who maintained a garage at Flora, which is about seven miles from Louisville. Parton testified, on behalf of appellant, that appellant had placed the car in question with him for storage about the first of December; that on the evening in question he took the car out of his garage at Flora to drive to Louisville on his own private business, and that later he visited the doctor's office to get some salve for himself, but did not do any work for the doctor that evening; that about a week before he had fixed an electric light for the doctor at his home; that he did not have the consent of the doctor to use the automobile on the night of the accident; that he took the car out of the garage without leave or license, and drove it to the doctor's house, and that the doctor saw him with the car.

Appellant testified that Parton did not have authority to use the car, and that he was not at Louisville on any business for him; that he was not in his employ the evening of the accident; that about a week before the accident Parton had fixed an electric light in the doctor's house; that on one occasion, when Parton was there, he told him to wash the car; that he told Parton on the evening of the accident to

drive the car back to Flora, and not to drive it any more; that this was the first time that he had learned that Parton had taken his car out of the garage.

Appellee's testimony tended to show that Parton fixed the doctor's electric light in his house the night of the accident, and that the collision occurred while Parton was driving to his garage at Flora from Louisville; that prior to going to Flora he told a man in his garage that he was going over to doctor Dillman's house to do some work; that after the accident Parton made the statement that he had been at the doctor's house fixing a light for him.

Appellee contends that, because appellant filed only the general issue, he is precluded from showing that Parton was not his agent or servant at the time of the accident.

This objection was not urged specifically in the trial court. Appellee, in his declaration, averred the car was operated at the time of the accident by the servant of appellant. He offered proof on the trial, in making out his case in chief, tending to prove such averment. He made no specific objection to evidence offered by appellant on that question, and offered and had given instructions telling the jury the law as to what facts were necessary to be proved in order to establish agency.

Where both parties at the trial pursue the same methods of proof, and ask instructions upon the theory that certain facts are put in issue by the pleadings, they will not be permitted in the reviewing court to adopt a different theory. (Logan v. Mutual Life Ins. Co., 293. Ill. 510; 31 Cyc 733 ; Johnson v. Johnson, 166 Ill. App. 422.)

In order to bring a case within the exception to the general rule, requiring a party injured to bring his action against the person causing the injury, it is necessary to show that such person was the servant of another, and that the relation of master and servant existed at the time of the injury and

in respect to the particular transaction out of which the injury arose. (Johanson v. Johnston Printing Co., 263 Ill. 236.)

The primary test to determine the master's liability for the negligent act of his servant is whether the act was within the scope of his employment or whether the servant was at the time of the act at liberty from the service of his master, and not engaged in doing his master's business, and was pursuing his own interests exclusively. Arkin v. Page, 287 Ill. 420; Orr v. Thompson Coal Co., 219 Ill. App. 116; Miller v. Nat. Automobile Sales Co., 177 Ill. App. 367.)

The evidence in the record admits of only one conclusion, - that William Parton, at the time of the accident was not the agent or servant of appellant, and even though prior thereto he had been at appellant's house fixing a light for him, it cannot be successfully urged that this act made him liable for the subsequent conduct of Parton.

The most that can be said is that the relation of bailor and bailee existed between appellant and Parton, and a bailor is not responsible to third persons for injuries received through the negligence of the bailee. (Woods v. Bowman, 200 Ill. App. 612, and cases cited therein.)

In view of the fact that a clear preponderance of the evidence shows that the automobile was not operated at the time of the accident by appellant or any employee or agent of his, the judgment cannot be sustained.

It is, therefore, reversed with a finding of fact.

Reversed.

Finding of fact: The automobile that injured appellee was not being operated at the time of the accident by appellant or by any of his agents, servants or employees.

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111-1-70

Robert L. ...
CLERK OF THE ...
FOURTH DISTRICT

928.
349 I.A. 663

AG. 23.

VS.

The declaration alleged that on and prior to

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hood, would be tempted to climb up between said two poles and rest on the crossarms fastened thereon; that appellee knew, or by the exercise of ordinary care should have known, that small children in the neighborhood, including appellant's intestate, were and had been in the habit of passing along and playing around such place, and would be attracted and tempted to climb between said poles, and thereby would be in danger from the heavy current of electricity passing through the wires suspended from the crossarms on said poles; that appellant's intestate, a child about twelve years of age, while playing near said poles, and following the childish impulses of a boy of his age, and, while using such care as a child of his age would ordinarily use under like circumstances, climbed up between the two poles, and, while on the crossarms thereon, came in contact with appellant's electric wire and was killed.

The first special count of the declaration, as amended, is substantially the same as the original county, with the exception that it charges that appellee negligently kept and maintained two of said poles in close proximity to each other.

Appellant contends that the questions involved are questions of fact, which should have been submitted to the jury for determination, and the sole claim for reversal is that the court erred in directing a verdict for appellant.

Appellant, in his brief, states that "the facts involved are substantially without dispute"

Appellee maintained its power line along the south line of the C. B. & Q. Railway switch, which extends in an easterly and westerly direction from a coal mine called the "North Mine", to the Village of Coello. Appellant's family lived east of the mine and to the north of the railroad, on a



north and south highway, which extended only to the north line of the railway right of way. A short distance east of this highway and parallel therewith another highway extends across the railway, and on this highway, just south of the railway, is located a public school, which was attended by appellant's intestate and other children in the neighborhood.

Along the north side of the railway there is a public road, extending from the "North Mine" to the highway, which passes by the school.

For several years the general public used the railroad right of way for foot travel and, at times, for vehicle travel when the road on the north side was in bad condition.

Leading from appellant's home there was a footpath going south along the public highway to the railroad, and then crossing the same to the southeast and going toward the east along the right of way to the road near the school. This footpath was used by children in going to and from school for about ten years prior to the accident.

Along the south line of the railroad right of way, appellee maintained a row of poles, on which its power line was carried, supplying power to the "North Mine". A woven wire fence extended along that part of the south right of way line, where the two poles in question were located, which was about twenty feet southwest of the point where the foot-path crossed the right of way in its course from appellant's home to the school.

The original power line was constructed and maintained in accordance with the rules and requirements of the Illinois Commerce Commission.

Three days prior to the accident in question, appellant caused new poles to be set about twelve inches west of the old poles, preparatory to a replacement of its pole line along the railway, and a transfer of the crossarms and wires

The first part of the paper is devoted to a general discussion of the problem of the origin of life. It is shown that the problem is one of the most important and most difficult in the history of science. The author discusses the various theories of the origin of life, and shows that the most plausible is the theory of spontaneous generation. This theory is based on the fact that life is a complex of many different parts, and that these parts are all found in the same place, and in the same form. This is a strong argument in favor of the theory of spontaneous generation.

The second part of the paper is devoted to a discussion of the problem of the evolution of life. It is shown that the problem is one of the most important and most difficult in the history of science. The author discusses the various theories of the evolution of life, and shows that the most plausible is the theory of natural selection. This theory is based on the fact that life is a complex of many different parts, and that these parts are all found in the same place, and in the same form. This is a strong argument in favor of the theory of natural selection.

The third part of the paper is devoted to a discussion of the problem of the origin of man. It is shown that the problem is one of the most important and most difficult in the history of science. The author discusses the various theories of the origin of man, and shows that the most plausible is the theory of spontaneous generation. This theory is based on the fact that life is a complex of many different parts, and that these parts are all found in the same place, and in the same form. This is a strong argument in favor of the theory of spontaneous generation.

The fourth part of the paper is devoted to a discussion of the problem of the evolution of man. It is shown that the problem is one of the most important and most difficult in the history of science. The author discusses the various theories of the evolution of man, and shows that the most plausible is the theory of natural selection. This theory is based on the fact that life is a complex of many different parts, and that these parts are all found in the same place, and in the same form. This is a strong argument in favor of the theory of natural selection.

appellee at the time the new poles were set, for the reason that the work of setting the new poles, from a practical working arrangement, should be completed by one gang of men, and then the transfer of the crossarms and wires would be made by another gang of men, generally within three or four days thereafter, at a time when the electric current could be disconnected from the line.

As to the two poles in question, where the accident occurred, the east pole was the old one, which was being replaced by a new and higher pole. The new pole had been set in place about twelve inches west of the old pole on the Saturday preceeding the accident, which occurred on the following Tuesday. The new pole was about sixteen inches in diameter and thirty feet high, while the old pole was about eleven inches in diameter. On the old pole there was a crossarm about fifteen feet from the ground, on which were fastened telephone wires, and eight and eleven feet above this crossarm were two more crossarms upon which were fastened insulators, to which were attached the power lines for carrying the electric current.

Both the old and new poles were unpainted wooden poles, with no steps or ladders attached to either pole. There was a galvanized iron guy wire extending from a point twenty feet above the ground on the old pole to about twelve feet from the base of the pole.

There were only two eye witnesses to the accident. The witness, Gete Gax, testified for appellant that he was nine years old at the time of the accident; that he saw Frank Smykaj (deceased) and Willie Mitchiff on the track talking together; that Frank went down by the guy wire and tried to pull himself up; but the pieces of rust from the guy wire stuck in his hands and he let go; that he then started climbing up between the two poles with his back to the new pole and his hands and feet on



the old pole; that the witness was sitting on the railroad track watching Frank, and, when Frank got two or three feet above the fence on the pole, Willie told him to go higher, and, after repeated urging, Frank climbed to the top of the telephone crossarm, and there stopped for three or four minutes; that Willie told him to go higher and, after repeated requests, he finally reached the top crossarm and got astride thereof, when he touched the top iron and received an electric shock which killed him, causing his body to fall to the ground.

The other eyewitness, Willie Mitchiff, testified on behalf of appellee, that he was fourteen years old at the time of the accident; that he was going home along the railway track; that he first saw Frank (deceased) on the first crossarm; that he saw him on the guy wire before he saw him on the crossarm; that he did not know how he got up on the crossarm; that he told him to come down; that, when Frank got to the second arm, he said it sounded like a radio, and asked the witness to come up; that Frank had hold of the top crossarm, when the witness started to go home, and was about fifty feet away when the shock came.

The general rule is that negligence and contributory negligence are questions off-~~at~~ for the jury, but, when the facts are admitted and all reasonable minds agree that the defendant was not negligent in its acts, or that the injury was the result of the plaintiff's own negligence, the court, may, as a matter of law, find that there was no negligence on the part of the defendant, or that there was such contributory negligence on the part of the plaintiff as to defeat recovery, and so inform the jury by peremptory instruction..

It is for the court to say whether there is sufficient evidence before it to present an issue of fact under the pleadings, and, if there is not, it is the duty of the court to direct what verdict shall be returned. (Austin vs.

Public Service Co., 299 Ill. 112.)

Counsel for appellant contends that under the admitted facts in the record the maintenance of the two poles in question in such close proximity on the railroad right of way constituted an "attractive nuisance", and that appellee should be held liable for the damages sustained by appellant.

In Austin v. Public Service Co., 299 Ill. 111-112(118-9), it was held:-

"One engaged in the business of manufacturing, transmitting and distributing electric current is only required to exercise such care and caution as a person of ordinary prudence might reasonably be expected to exercise in the handling of such a silent and dangerous agency under similar circumstances, and if he places his wires in such a position that they will not inflict injury on a person in the exercise of his rights and privileges while he is using due care and caution for his own safety he has fully performed the duty which the law imposes upon him. xxxxxxxxxxxx

"In order to charge a person engaged in the business of handling electric current with liability, it is necessary that the injury which results from such dangerous agency be one which a person of ordinary prudence, in the light of the surrounding circumstances, would reasonably and naturally have anticipated."

In McDermott v. Burke, 256 Ill. 401, the court laid down certain elementary principles with reference to a defendant's liability under the "attractive nuisance" doctrine, and it was there held (page 406), as follows:-

"Under our decisions, which are most liberal to children, if the conditions are such that the owner may reasonably anticipate that children of such tender age as to be incapable of exercising proper care for their own safety may by their own instincts be attracted to the dangerous thing and thereby exposed to danger, he will be liable for an injury to a child so attracted, resulting from leaving the machine or dangerous thing exposed. Under such circumstances he would have good reason to expect that children, from their well known habits and nature, would be attracted to the dangerous thing, and its maintenance would amount to an implied invitation to them, so that they cannot be regarded as voluntary trespassers, (City of Pekin, vs. McMahon, 154 Ill. 141.). It is a necessary element of the liability that the thing which causes the injury is tempting to children and to constitute a means of attracting them upon the premises which the owner should anticipate. The dangerous thing must be so located as to attract them from the street or some public place where they may be expected to be. An owner would not be liable if he maintained something for his own use which might be dangerous but which would only be found by children going upon his premises as trespassers."

Having in view the principles of the foregoing cases, the question for determination is whether the evidence

in the record, giving to appellant its most favorable construction and benefit, has made out such a case as would sustain a verdict in his favor.

The declaration charges that the poles in question maintained in such close proximity as to constitute an "attractive nuisance", and that appellee had actual or constructive knowledge that children of tender years were in the habit of playing about such poles.

The evidence does not show that these poles even tended to constitute an "attractive nuisance", or that any child, other than appellant's intestate, ever played about or was attracted to the immediate vicinity of the poles.

Proof of the foregoing allegations are essential in order to make out a case. (see *McAllister v. Young*, 112 Ill. App. 138; *Follett v. Illinois Central R. R. Co.*, 288 Ill. 506 (515); *Ramsay v. Tuthill Material Co.*, 295 Ill. 395.)

The record shows that children used a pathway along and across the right of way a considerable distance from the poles in question, and that the tracks of the railway were used by the public for passage at times, but the nature of the ground in the immediate vicinity of the poles was such that it was not used as a play ground by the children.

The poles were the ordinary, unpainted wooden poles, without steps, spikes or lattice work, such as can be observed on any public highway in any community where electricity is used for lights, power or telephone purposes.

The temporary placing by appellee of another pole close to the old one for a period of three days, during the ordinary prosecution of the reconstruction of its line, may have furnished the condition, which enabled the deceased to demonstrate his agility as a climber, but appellee could not, under the facts in this record, be held to anticipate the results and

become liable therefor.

Counsel for appellant cite the cases of Stedwell v. City of Chicago, 297 Ill. 486 and Deming v. City of Chicago, 321 Ill. 341, in support of their theory of liability, but an examination of these cases shows that the facts are so different from those in the case at bar that it is sufficient to say that, in our opinion, they are not controlling as to the issues here presented.

The remaining question for consideration is whether the deceased was in the exercise of due care and caution for his own safety at the time of the injury, which caused his death.

The evidence showed that the deceased was a normal, healthy, and active lad, not quite twelve years of age; that he was in the fifth grade at school, and good in his studies; that he exhibited considerable ability, alertness, and activity in his venture of climbing the pole, which led to his fatal injury; that his ascent of the pole was made in response to repeated requests of his companion to go higher, and, when urged to touch the wires on top, he refused, indicating that he had some knowledge that it was dangerous; that his companion, Gete Gax, was two years younger than the deceased, and he testified that he knew the wires on the poles were dangerous, and that he did not climb them for fear of being killed.

The deceased was old enough to know, and his experience was such as to convince one that he knew the danger attending the hazardous act of climbing the pole in question, and, in view of all the undisputed facts in the record, we are of the opinion that the deceased was not in the exercise of ordinary care for his own safety at and prior to the injury, which caused his death, and that the record clearly sustains

the proposition that all reasonable men would arrive at the same conclusion in considering all those portions of the record which are most favorable to appellant.

For the reasons aforesaid, we are of the opinion that the Judgment of the court below should be affirmed, which is accordingly done.

AFFIRMED.

not to be reported.

6758a
IN THE
APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT

249 I.A. 663³

FEBRUARY TERM, A. D. 1928.

TERM NO. 27.

AGENDA NO. 20.

JACOB BOEHMER, :
Appellee, :
VS. : APPEAL FROM THE CITY COURT
BALTIMORE & OHIO RAILROAD :
COMPANY, : OF EAST ST. LOUIS, ILLINOIS.
Appellant. :

NEWHALL, J.

Appellee recovered a judgment against appellant for damages sustained by reason of a collision at a highway crossing in the City of East St. Louis.

The declaration charged that appellant's railway tracks extended across St. Clair Avenue; that while appellee, in the exercise of due care for his own safety, was driving an automobile along the street, appellant negligently collided with appellee's automobile, causing the same to be wrecked and injuring appellee.

Plea of general issue was filed, verdict for \$1795.00 damages, and judgment rendered after motion for a new trial was overruled. A motion for a directed verdict at the close of plaintiff's case and at the close of all the evidence was overruled and excepted to by appellant.

Appellant contends that the verdict is against the manifest weight of the evidence, that appellee was guilty of contributory negligence, and that the court erred in refusing and in the giving of instructions.

Appellant's railway tracks extend across St. Clair Avenue in a northerly and southerly direction. St. Clair Avenue is a public street, sixty feet in width, in East St. Louis,

I N T H E
APPELLATE COURT OF ILLINOIS

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Appellant contends that the verdict is against the manifest weight of the evidence, that appellee was guilty of contributory negligence, and that the court erred in refusing and in the giving of instructions.

Appellant's railway tracks extend across St. Clair Avenue in a northerly and southerly direction. St. Clair Avenue is a public street, sixty feet in width, in East St. Louis,

extending in an easterly and westerly direction, with a single street car track in the center. The railway tracks of the Louisville & Nashville Railroad Company are immediately adjacent to and east of the tracks of appellant. The railway tracks of the Pennsylvania Railroad also extend across St. Clair Avenue, about a block west of the tracks of appellant.

On December 2, 1925, about midnight, appellee was driving his automobile easterly along St. Clair Avenue, when he collided with a locomotive of appellant, which was backing northerly across St. Clair Avenue. The evidence on the part of appellee tended to show that the railway employees did not blow any whistle, sound any bell, or have the locomotive head-light burning as the locomotive, with nine cars attached, approached and crossed the street. Appellee testified that when he approached the tracks he looked to the left (north) and saw nothing, then turning to the right (south) he could not see anything approaching on appellant's tracks because of a building and cars on a switch track, which obstructed his view; that he did not see the locomotive prior to the tender striking his automobile, when he suddenly, just before the impact, turned his wheel to the left, and he and his car, with a woman passenger, were dragged across the street to the north, where his car was lodged between a telegraph pole and a switch tower; that the locomotive was running about twenty-five miles an hour at the time of the collision, and appellee's automobile was traveling between eight and ten miles an hour at the time of the accident.

The passenger riding with appellee at the time of the accident did not testify, and the only other witness on behalf of appellee was the witness Seibert, who testified that he was riding in his own automobile, from fifty to one hundred feet in the rear, at the time of the collision; that he had followed appellee about a block, from one railroad track to the one in question; that he was going from twenty to thirty miles an hour;

that he did not see the engine strike appellee's car, for his view was obstructed; that he was about to pass appellee's car when he saw appellee's car dragged in front of the tender and pulled across the street to a point near the switch tower; that he heard no warning bell or whistle, and did not see any light on the tender of the locomotive; that he did not see any railway cars approaching, when he started to cross the tracks; that he did not observe the speed of the train, and that his view was obstructed by a coal shanty.

On cross-examination, Seibert testified that appellee did not stop for the crossing of the Pennsylvania tracks, which is a block west of the crossing in question; that he came from the south along Second Avenue and turned into St. Clair Avenue near the Pennsylvania crossing, and was then following appellee's car, which was then traveling around twenty-five miles per hour, and that appellee was going between ten and twenty miles an hour, when he approached the tracks in question; that he, Seibert, was then going about thirty miles per hour, and that he would have passed appellee within the next two hundred feet, except for the collision which then occurred; that he was not paying any particular attention to appellee's car or the railway tracks; that he relied upon the crossing gates for warning if there was any danger; that he did not pay any particular attention as to whether there was any train whistling or bell ringing; that his view of the railroad was obstructed by buildings on the right, but that he was not certain that the whole view was obstructed; that appellee slowed up the speed of his car just before the accident, and just prior to the collision he was going between five and forty miles per hour; that he did not see the impact, but did see the engine pushing the automobile along the track; that he was not positive whether the street light over the tracks was lighted at the time of the accident.

The evidence on behalf of appellant showed that south

of St. Clair Avenue and west of the tracks of appellant there was a small coal office about six by eight feet and six and one-half feet high. It was located twenty-two feet from the south curb line of the street and about twenty-two feet west of the west rail of appellant's tracks. South and in the rear of the coal office there is a switch track running to the south, the north end of which is one hundred fifty feet from St. Clair Avenue and about one hundred twenty-five feet from the coal office. A person approaching from the west and traveling east has a clear view for about twenty-two feet after passing the coal office, and a train coming from the south can be seen for a distance of from seven hundred to a thousand feet. Photographs of the scene of the accident were offered in evidence, which clearly substantiate appellant's version of this unobstructed view.

The engineer and trainmen for appellant testified that just prior to the accident the locomotive stopped about a hundred feet south of St. Clair Avenue to enable the switchman to throw a switch for the purpose of allowing the cars to get on the westerly track across St. Clair Avenue; that a crossing whistle signal was given, and the locomotive backed across the street with the automatic bell ringing and the headlight burning; that the switchman proceeded ahead of the engine upon the crossing, and with his lantern endeavored to protect traffic on the street while the train was crossing; that, while the switchman was facing the west on the crossing, he waved his lantern toward appellee's approaching automobile, which was being driven at a speed of about thirty miles an hour; that appellee paid no attention to the train or to the signals of the switchman, and crashed sidewise into the tender at about the middle of the street, with the result that the automobile was dragged to a point on the north side of the street, where the locomotive stopped; that the train was backing at a speed of about five miles per hour. Four witnesses testified in behalf of appellant that marks and indentations were found on the side of the tender, and it is quite evident that appellee ran

part way across the street.

If appellee was only traveling at the rate of ten miles or less per hour, as he testified, it is difficult to understand why he could not have avoided the accident, if he had either looked or listened after he passed the coal office. His view of the tracks at that point was unobstructed, and his failure to observe where he was going, under all the circumstances shown by the record, was clearly contributory negligence on his part.

If, as appellee says, he could not see because of alleged obstructions, which a clear preponderance of the evidence shows did not exist, then all the more reason why he should have used more caution than he did in proceeding in the night-time in a place of known danger, without carefully ascertaining that the way was safe for him to proceed.

This Court held in *DeBow v. C.C.C. & St. L. Ry. Co.*, 245 Ill. App. 158, that it is the duty of every person about to cross a railroad track to approach cautiously, and to endeavor to ascertain if there is personal danger in crossing, for all persons are bound to know that such an undertaking is dangerous, and they must take all proper precautions to avoid accident in so doing, otherwise they cannot recover for injury thereby received.

According to appellee's only witness (Seibert) to the accident, he was traveling at the rate of twenty-five miles per hour when he crossed the tracks of the Pennsylvania Railroad, a block west of the scene of the accident, and that he approached the crossing in question at a speed of from ten to twenty miles per hour, which speed is in excess of that provided for by Section 161 of the Road and Bridge Act.

After carefully considering all the evidence in the record bearing upon appellee's care and caution prior to the accident, and in view of all the surrounding circumstances and conditions testified to by the various witnesses, we are of the

opinion that the verdict is manifestly against the weight of the evidence, and that appellee's allegations of negligence against appellant are not sustained by a preponderance of the evidence.

Appellant also contends that the court erred in modifying appellant's instruction numbered ten, and in refusing its instruction numbered eleven, and, in view of the decisions and holdings in *DeBow v. C. C. C. & St. L. Ry. Co.*, 245 Ill. App. 158, and in *C. C. Ry. Co. v. O'Donnell*, 208 Ill. 267, and in *Fowler v. C. & E. I. R. R. Co.*, 234 Ill. 619, we are of the opinion that the trial court erred in modifying instruction numbered ten and in refusing instruction numbered eleven.

For the reasons above set forth, the judgment of the trial court is reversed and the cause remanded for new trial.

REVERSED AND REMANDED.

Not to be reported.

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and published in
full by order
of court - Published
in 251, No. 3

ILLINOIS

CT

. 1926.

AGENDA NO. 12.

: 249 I.A. 663⁵

: ERROR TO THE COUNTY

: COURT OF LAWRENCE COUNTY.
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ay, A. D. 1926, the plaintiff
lff of Lawrence County. After
ched and a number of articles
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Plaintiff in Error, nor any
of his automobile. Upon the

car being searched by the Sheriff, and others who were with him,
there was found a five gallon jug containing distilled water,
two empty gallon bottles, two small vials of coloring matter,
a tin measuring can with a funnel attachment, a hydrometer and
an eight ounce-bottle about half-full of liquid which was later
determined to contain about 25% of alcohol by volume. All of
the articles were seized by the sheriff. The defendant was
taken in custody and placed in the County Jail.

On the 26th day of May, 1926, the States Attorney
of Lawrence County filed an information in the County Court,
charging the Plaintiff in Error, in the first count of the in-
formation, with the illegal possession of intoxicating liquor,
in violation of the Prohibition Act; and on the second count
thereof with the illegal transportation of intoxicating liquor



6760

I N T H E
APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT

FEBRUARY TERM, A. D. 1928.

TERM NO. 29.

AGENDA NO. 12.

WILLIAM AKERS,
Plaintiff in Error,

VS.

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error.

: 249 I.A. 663⁵
: ERROR TO THE COUNTY
: COURT OF LAWRENCE COUNTY.
:

WOLFE, J.

On the 24th day of May, A. D. 1926, the plaintiff in error was arrested by the Sheriff of Lawrence County. After his arrest his automobile was searched and a number of articles taken therefrom. At the time of the arrest the officers had no warrant for the arrest of the Plaintiff in Error, nor any search warrant for the searching of his automobile. Upon the car being searched by the Sheriff, and others who were with him, there was found a five gallon jug containing distilled water, two empty gallon bottles, two small vials of coloring matter, a tin measuring can with a funnel attachment, a hydrometer and an eight ounce-bottle about half-full of liquid which was later determined to contain about 25% of alcohol by volume. All of the articles were seized by the sheriff. The defendant was taken in custody and placed in the County Jail.

On the 26th day of May, 1926, the States Attorney of Lawrence County filed an information in the County Court, charging the Plaintiff in Error, in the first count of the information, with the illegal possession of intoxicating liquor, in violation of the Prohibition Act; and on the second count thereof with the illegal transportation of intoxicating liquor



in violation of the Illinois Prohibition Act.

On the 15th day of June, A. D. 1926, the Plaintiff in Error filed in the County Court his motion to suppress from evidence the articles which the Sheriff had seized on the 24th day of May, upon the ground that the searching of his automobile was in violation of his constitutional rights; also, that no search warrant was issued against the Defendant legalizing the search, and that he was not at the time of his arrest in the act of committing any crime, etc.

A hearing was had upon the Defendant's motion to suppress the evidence, and the Court overruled the said motion, and granted the Plaintiff in Error the right to preserve his bill of exceptions, which the Plaintiff in Error did on the 16th day of August, 1926.

The cause was continued and on the 21st day of February the Plaintiff gave notice to the States Attorney of Lawrence County that he was ready for trial at the March Term 1927 of said court; that he desired a jury summoned and drawn in the manner provided by statute for drawing of jurors for the Circuit Court.

At the March Term 1927 of said Court a special venire was issued by the Judge of said Court directing the selection of a petit jury for the cases to be tried at said March term. The Plaintiff in Error on the 30th day of March 1927, filed a motion to quash this jury panel, but the trial court overruled said motion and the case on the same day proceeded to trial. After evidence was introduced, both for the State and the Defendant, the jury found the Defendant guilty on each count of the information; After a motion for a new trial and arrest of judgment were overruled the Court assessed a fine against the defendant of \$300.00 on the count charging illegal possession of intoxicating liquor, and \$300.00 on the count charging illegal transportation of intoxicating liquors. From the judgment the

Plaintiff in Error prosecutes his writ of error to this Court and seeks a reversal of the judgment of the trial court.

The first assignment of error is: That the court erred in overruling the Defendant's motion to suppress the evidence in the case.

There is no exact rule that can be laid down as to when an officer would be justified in searching an automobile without a search-warrant, but the true rule seems to be that each case must stand or fall on the facts as produced in the particular case. The Court in this case, after hearing the evidence, was of the opinion that the Sheriff had sufficient knowledge relative to the contents of the defendant's car and to his personal actions to justify the Sheriff in searching and seizing the contents of the car.

In cases of this character, if the facts and circumstances then patent to the Sheriff, were such that would reasonably lead an officer to believe that the law is being violated by the unlawful possession of, or transportation of intoxicating liquor, he is authorized to seize and hold the same and to cause the arrest of the person so transporting or possessing such liquor. This rule is laid down in the case of *Ash v. The United State*, 299 Federal, page 279; *Milan v. U. S.* 296 Federal, page 629. "On recent authority the true ruling is: If search and seizure without a warrant are made upon probable cause, that is, upon a belief reasonably arising out of the circumstances known to the seizing officers, that an automobile, or other vehicle contains that which by law is subject to seizure and destruction, the search and seizure are valid."

Such is the language used by Chief Justice Taft in rendering the decision of the Court in the case of *Carroll v. The United States*, 267 U. S. page 132.

From the facts and circumstances in the case at bar this court is of the opinion that the sheriff had reasonable grounds to believe that the defendant was violating the Illinois Prohibition Act, and that the search and seizure was justifiable and legal. The trial court committed no error in overruling



defendant's motion to suppress the evidence.

In transferring this case from the Supreme Court (People vs. Akers, 327 Ill. 137) to this court our Supreme Court held that the plaintiff in error's constitutional rights, both under the Constitution of the United States and the Constitution of the State of Illinois, had not been invaded.

"Plaintiff in error contends that the search of his automobile was an invasion of his constitutional rights under the constitution of the United States and of the State of Illinois. That question, however, is in nowise involved in this case. The undisputed evidence is that when the sheriff proposed to search plaintiff in error's automobile plaintiff in error told him to go ahead and search, and that when the sheriff attempted to open the door of the car it stuck, and plaintiff in error came up and said, "I will open it," and he thereupon opened the door in order that the sheriff might search the car. Where a person consents to a search of his premises or vehicle by officers without a search warrant he thereby waives all right to complain that his constitutional rights have been invaded."

Objection is made to the introduction of evidence on behalf of the People and the rejection of proper evidence on behalf of the Defendant. Especially does the Defendant object to the exhibits introduced in evidence by the People which were the articles seized by the sheriff when he searched Defendant's car. The introduction of these exhibits were proper. They were a part of the things seized in the Defendant's car and it was then a question for the jury, whether under all of the circumstances the Defendant was guilty of one or both of the charges in the information.

Further objection is made in regard to the action of the States Attorney in passing a bottle containing alcoholic liquor to the jury to let them smell the same. This should not have been done for the jury may or may not be qualified to tell from the smell of a substance or liquid whether it contained more than one-half of one percent of alcohol. They were liable to be misled in regard to the odor of the substance in this bottle. But the error in this case is harmless, as it was not seriously contended that the contents of this bottle was not intoxicating liquor containing more than one-half of one per cent of alcohol by volume. The main contention of the defendant is that all of the exhibits were improper as evidence against him, and he further claims that he had had nothing whatever to do with this bottle of liquor and had no knowledge that it was in his car.

There are other objections to the introduction of evidence which we have not specifically pointed out, but we are of the opinion that there was no reversible error in the admission or the rejection of the evidence in this case.

The defendant's motion to quash the panel on the ground that the jury of thirty names were not drawn from the box in the same manner as jurors are called in the Circuit Court



was mainly based on the request for such jury, filed with the States Attorney, who had nothing to do with the manner in which jurors shall be called in the County Court. If the defendant had wished to have availed himself of the right, if any such existed, to have the jury called in this manner, he should have addressed his notice to the County Judge, who is the one to decide on how the jury shall be called in the County Court.

The defendant does not show in any manner in what way his rights were prejudiced by the Court overruling his motion to quash the panel. The defendant claims that it was 'a hand picked jury', but, this court can see nothing in the record as to where that question was ever raised before the trial judge, which would lead us to believe that anything was irregular, or that the jury was 'hand picked', or the defendant prejudiced by calling the jury in the manner it was called.

We hold that the jury in this case was properly drawn and there is no error in the court's overruling the motion to quash the panel.

The objection is made that the Court imposed a double sentence upon the Defendant, and that the verdict of the jury is indefinite, illegal, and double in its nature. The verdict is sufficiently clear for the court to determine of what offense the jury meant to find the Plaintiff in Error guilty. There is no special form required from a jury in delivering their verdict, and if the court can see the clear intent of the jury from a reading of their verdict, then the verdict would be sufficient in form. All reasonable intendment should be made in order to sustain the verdict of the jury when the validity of the same is challenged on merely technical grounds. (Meadowcraft, vs. The People, 163 Ill. 56.)

The information charges the Defendant with two separate and distinct offenses. One of illegal transporting, and the other with illegal possessing intoxicating liquor. The jury

The first part of the paper discusses the importance of the study and the objectives of the research. It also mentions the scope of the study and the limitations. The second part of the paper discusses the methodology used in the study. It mentions the data sources and the data collection methods. The third part of the paper discusses the results of the study. It mentions the findings and the conclusions. The fourth part of the paper discusses the implications of the study. It mentions the practical implications and the theoretical implications. The fifth part of the paper discusses the future research. It mentions the areas for further research and the suggestions for future studies.

could have found the Defendant guilty of one, or both, or neither of the charges in the information, but from their verdict they found the defendant guilty of each charge in the information, hence, it would not be a double sentence if the judge sentenced the Defendant to pay a fine on each count of the information.

The defendant also objects to the argument and actions of the States Attorney during the trial of the case and especially to his closing argument. The specific objections are set forth in the defendants motion for a new trial supported by affidavit of the Defendant. On motion of the States Attorney assignments Nos. 8, 10, 11, and 12, were stricken by the court. Counsel for the defendant cites numerous cases that have been reversed for the improper argument and conduct of the States Attorney in his closing argument to the jury. No doubt the judgment of the court was proper in all of those cases, but so far as this Court is advised in all of the cases that have been reversed on the ground of the improper conduct and argument of the States Attorney, the trial court's attention was called to the fact at that time and an objection was made by the attorney for the defendant to such conduct and remarks of the States Attorney. In this case the record shows no objection whatsoever to any conduct of the States Attorney, either to his actions or to his remarks in the closing argument to the jury.

No doubt that if the trial Judge's attention had been called to this fact by proper objection he would have ruled that they were improper and avoided the error, if any; but, this Court cannot now say from the showing that is made in this case, when there had been no objection whatsoever in the trial court to such statements, that the defendant has been prejudiced thereby. If the defendant wishes to preserve an objection to anything that occurs in the trial court he should make his objection first in that court and it will then be considered by this court on appeal or writ of error.

We find no reversible error in this case and the judgment of the Lawrence County, County Court is hereby AFFIRMED.
Not to be reported.

6761a

IN THE
APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT

FEBRUARY TERM, A. D. 1928.

FILED

JUN 1 1928

RECEIVED
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

TERM NO. 9.

AGENDA NO. 15.

HURST STATE BANK OF HURST,
ILLINOIS,

Appellant,

VS.

ESTATE OF PETER K. FRIEDLINE,
Deceased,

Appellee.

249 I.A. 664¹
APPEAL FROM THE CIRCUIT

COURT OF JACKSON COUNTY.

WOLFE, J.

This is an appeal by the appellant, Hurst State Bank of Hurst, Illinois, from a judgment of the Circuit Court of Jackson County, Illinois, in failing and refusing to order that the claim of said bank against the estate of Peter K. Friedline, deceased, the appellee herein, in the sum of \$5215.63, to be paid out of the general assets of said estate in due course of administration.

This case was originally tried in the County Court of said County without a jury and the Court allowed the claim of said bank against said estate, for the sum of \$5215.63, as a claim of the sixth class, but ordered that it be paid out of the assets not inventoried or accounted for on or before October 20, 1925. From this ruling and judgment of the County Court in refusing to order that said claim be paid out of the general assets of said estate in due course of administration said bank perfected an appeal to said Circuit Court.

On the trial of the case in the Circuit Court without a jury, the Court found said estate indebted to the bank in the sum of \$5215.63, and entered an order similar to that of the County Court, allowing the claim as of the sixth class.

The Court found that said claim had not been presented to the County Court of said Jackson County within one year from the date letters of administration were issued in said estate, and ordered that said claim be paid only out of property, or assets of said estate not inventoried, and that it be not paid out of the general assets of said estate. From which ruling and judgment of the Circuit Court the appellant bank duly excepted and perfected an appeal to this Court.

The facts in the case are not in dispute. Friedline, in his life time, had borrowed about \$4000.00 from the appellant and had given his four promissory judgment notes as evidence thereof, said notes bearing interest, etc., said notes were due and unpaid with the accumulated interest thereon at the time of the death of Friedline, and still remain unpaid. The claim in question is for the amount due on these notes.

The deceased, Peter K. Friedline, resided in the village of DeSota, in Jackson County, Illinois, and departed this life on September 3, 1924, leaving a Last Will and Testament. On October 20, 1924, the said Last Will and Testament was admitted to probate by the County Court of said Jackson County, and on the same date Letters of Administration were issued to the First National Bank of Murphysboro, Illinois. From thence until the present time the bank has been acting as such executor.

On December 31st, 1924, the said executor filed in said County Court an inventory of the real and personal property belonging to said estate,

The adjustment day in this estate was Monday, December 1, 1924. On or about November 30th, 1924, W. B. Sizemore, cashier of the appellant, being under the impression that Joe Wells was the County Clerk of Jackson County, sent by mail from Hurst, Illinois, to the said Joe Wells, at Murphysboro, Illinois, a claim against this estate for \$4602.10, that

office was an unintentional mistake on the part of the agent of the appellant, who was under the belief that the person to whom the claim was forwarded, was in fact the clerk of the County Court, and the proper person to whom said claim should have been sent, and praying that said County Court exercise its probate and equity powers on the hearing of said claim, and allow said claim and order it paid out of the general assets of said estate.

At the hearing on this petition in both the County and Circuit Courts, the executor of said estate objected to the allowance of this claim on the ground that it had not been exhibited, nor presented to the County Court within one year from the date that Letters of Administration were issued.

In the Circuit Court on the trial of the case the appellant entered a motion that the original claim, which was filed in the office of the Circuit Clerk, on December 1st, 1924, be ordered filed in the County Court by the Clerk thereof nunc pro tunc, as of date December 1st, 1924, which motion was, by the Court, overruled, and exceptions, etc., taken.

Section 70 of our Statute provides: "All demands against an estate of any testator, or intestate, shall be divided into classes in manner following, to-wit: 6- All other debts and demands of whatsoever kind without regard to quality or dignity, which shall be exhibited to the Court within one year from granting of Letters as aforesaid, and all demands not exhibited within one year as aforesaid, shall be forever barred, unless the creditors shall find other estate of the deceased not inventoried or accounted for by the executor or administrator, in which case their claims shall be paid pro rata out of such subsequently discovered estate, saving however, to infants, persons of unsound mind, persons without the United States, in the employment of the United States, or of this State, the term of one year after their respective disabilities are removed to

exhibit their claims."

This section of our Statute has been repeatedly construed and held that the failure of a claimant to exhibit his claim to the Court within the statutory period of time bars his claim from participating in the inventoried assets of the estate. (Alderson v. Alderson, 226 App. 176; Smith v. Smith, 206 App. 239; People v. Small, 319 Ill. 437.); Numerous other cases can be found holding this same proposition to be the law.

It is the contention of the appellant that a different rule should apply in this case, for in the case at bar the executor of the estate and also the Judge of the County Court, (Who was formerly attorney for the executor.) had personal knowledge of the existence of this claim. No doubt this is the fact, and it is not disputed by the executor in the trial of the case. The case of Roberts v. Flatt, 142 Ill., 485, is a case very similar to the one at bar. The Court in that case says: "There is a marked distinction between the fact that an administrator may learn of the existence of a debt against an estate, which may never be presented, and the fact that a creditor appears in court and files a copy of his claim for adjudication." "The statute requires that claims be exhibited to the court within two years of the granting of Letters of Administration; and then declares that all demands not exhibited within two years as aforesaid shall forever be barred".

Counsel for appellant greatly stress the equity of their claim and insist that the Court of equity should take jurisdiction and decree that they should be allowed this claim, which in law has been barred by the Statute of limitations.

In the case of Alderson v. Alderson, 226 Ill. App. 176, the same question was presented to the Court. It was held in that case that claims not filed within one year from granting of Letters of Administration, should be paid only out of

subsequently inventoried assets, and that the statute fixing the time for filing a claim is not a general statute of limitation but that it is a specific act for the purpose of facilitating an early settlement of estates, and the failure to file a claim within the statutory period bars the claim from participating in the inventoried assets of the estate.

In the present case it may seem like a harsh rule to bar the appellant from participating in the general funds of this estate, but under the law we hold that this claim is barred from participating in the general funds of the estate, and that the order of the Circuit Court was proper.

The judgment of the Circuit Court of Jackson County is hereby affirmed.

AFFIRMED.

Not to be reported.

6762a
IN THE
APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT

FILED

JUN 1 1928

Robert B. Rice
CLERK OF THE APPELLATE
FOURTH DISTRICT OF ILLINOIS

FEBRUARY TERM, A. D. 1928.

249 I.A. 664²

TERM NO. 13.

AGENDA NO. 24.

C. C. STOTLAR AND JOHN Y STOTLAR,
doing business as Stotlar Lumber Yard,
Appellee,

VS.

JAKE FARNER,

Appellant.

:
: APPEAL FROM THE
: CIRCUIT COURT OF
: JACKSON COUNTY.
:

WOLFE, J.

The appellees filed their bill in the Jackson County Circuit Court to the September Term, 1926, alleging that the Appellant, Jake Farner, applied to the Appellees to furnish building materials to be used in the erection of a residence for himself, and that the said Jake Farner entered into a contract with the Appellees whereby the Appellees were to furnish, and the said Jake Farner was to pay for the building material for said residence; that the Appellant had not paid for said building material so furnished and contracted for, and prayed for a mechanic's lien upon the premises of the Appellant.

The defendant, Jake Farner, by his answer denied that he had ever entered into any contract with the Appellees, either expressed or implied, to furnish building material for a residence to be erected upon the premises as described in said bill of complaint; also alleged that all labor and material used in the erection and construction of his said residence and property located on the premises described in said bill of complaint, is and has been fully paid for.

The cause was referred to the Master in Chancery

to take evidence and report the same to the Court. On the hearing of the same before the Chancellor the issues were found in favor of the complainants, and a decree for the sum of \$71.49 was rendered in their favor as a lien, etc., against the property of the defendant.

The case comes before this Court on appeal from such decree of the Jackson County Circuit Court.

In a case of this kind the mechanic's lien statute must be strictly complied with and the burden of proving the allegations of the complainants bill is upon the complainants.

We have examined the records of this case and we deem it unnecessary to discuss the same, but it is sufficient to say that this Court is of the opinion that the complainants have not made out such a case as to entitle them to a mechanic's lien, and the Circuit Court erred in decreeing that the complainants should have such a lien against the defendant.

The judgment of the Circuit Court of Jackson County is hereby reversed.

Not to be reported.

TERM NO. 22.

STATE OF ILLINOIS.

AGENDA NO.6.

APPELLATE COURT,

FOURTH DISTRICT.

FEBRUARY TERM A. D. 1928.

FILED

249 I.A. 664³

JUN 1 1928
RECEIVED
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

THE EAST SIDE PACKING COMPANY,)
Appellee.)

VS.)

THE LOUISVILLE & NASHVILLE)
RAILROAD COMPANY,)
Appellant.)

APPEAL FROM THE CITY COURT
OF
EAST ST. LOUIS, ILLINOIS.

Wolfe, J.- This suit was commenced at the September Term, A. D. 1927, of the City Court of East St. Louis, Illinois, to recover damages for a car of meat shipped from St. Louis, to Miami, Florida, on September 15th, 1926.

The first count in the declaration charges that on September 15th, 1926, the plaintiff delivered to the defendant at East St Louis, in good order, a shipment of meats and packing house products to be safely and securely carried by the defendant from East St. Louis, Illinois, to Miami, Florida, and to be safely and securely delivered to the order of the plaintiff. The count also charges that the defendant neither safely and securely carried the meats and packing house products from East St Louis to Miami, Florida, nor at the latter place, safely delivered the same to the plaintiff, but on the contrary, through and by the negligence of the defendant and its servants on that behalf, the said meats, etc., were greatly damaged, etc.

The second count of the declaration charges failure upon the part of the defendant to carry and deliver the shipment in question within a reasonable time, because of which

1.

the damage was sustained, etc. The defendant filed thereto a plea of the general issue and a special plea setting up the provisions of the bill of lading, exempting the carrier from liability for injury from an act of God, and alleged that the damage sued for was due to an act of God, viz: A hurricane at Miama, Florida, on September 18, 1926, for which the defendant was not liable under the law.

The case was tried by the court without a jury and the finding of the court was in favor of the plaintiff, damages being fixed at \$2,000.00, pursuant to stipulations entered into between the parties to the effect that if the plaintiff was entitled to recover from the defendant on the facts proved and the law applicable thereto, the amount of the damage was agreed to have been \$2,000.00. From the judgment of the City Court of East St Louis in favor of the plaintiff for \$2,000.00 and costs, this appeal is prosecuted.

The plaintiff is engaged in the meat packing business in East St. Louis, Illinois, and on the date alleged in the declaration shipped a car-load of smoked meats, etc., to itself, in care of the Bailey Transfer Company, at Miama, Florida, via the line of the defendant. and its connecting carriers, the final carrier from Jacksonville, Florida, being the Florida East Coast Railroad Company.

The car in which the shipment was made belonged to the plaintiff. Before being loaded the car was properly packed and cooled by having its bunkers filled with ice and the doors of the car closed so as to reduce the temperature. After the car was iced and loaded it was delivered to the defendant on September 15, 1926, and left East St Louis on the same day. The shipping instructions given by plaintiff to the defendant on the bill of lading issued by the defendant had the following endorsement thereon: "Reice at E'ville, N'ville,

Birmingham, Montgomery, Tallahassee, Fort Pierce, Miama, Crushed ice 12 per cent salt. Keep iced if delayed."

There is no question raised as to the negligence of the defendant in the handling of the car in question until after its arrival at Jacksonville, Florida, at 7:05 a. m., on September 18th, 1926. From Jacksonville the car was moved to Ft. Pierce where it arrived at 12:20 p. m., on September 19th. The great hurricane in Miama began about midnight on September 17th, 1926, and continued with different degrees of severity and violence until about 11 a. m., September 18th, 1926. Conditions in Miama were greatly disturbed and chaotic during and immediately after this great storm. Some passenger trains were running into Miama on the evening of the day of the hurricane, although traffic was greatly handicapped by the wreckage and debris on and over the tracks of the railroad, caused by the storm. The car in question arrived in Miama on September 20th, 1926.

The plaintiff contends that the defendant was negligent in not placing the car in a proper place for the plaintiff company to unload the same, and by reason of such negligence the meat and other provisions in said car were greatly injured in value. It is also contended that the car was not properly iced by the defendant; that had it been properly iced the meats, etc., would not have deteriorated in quality and price and the plaintiff would not have suffered loss. On the other hand the defendant claims that on account of the terrible storm that the damage was not caused by their negligence, but by the "Act of God", and that it was impossible for them to properly care for and ice the car in question, and according to the provisions in the bill of lading they would not, therefore, be liable for any damage beyond their control.

Practically the only question in the case is

whether or not it was the negligence of the defendant company, or whether it was the act of God which caused the loss.

The defendant assigned as error that the judgment of the court is against the weight of the evidence; also, that the court erred in not finding for the defendant at the close of the plaintiff's evidence, and at the close of all the evidence in the case.

After a careful review of the evidence in this case we cannot say that the trial court was not justified in finding in favor of the plaintiff under the law and evidence in the case. There is a sharp conflict in the evidence relative to the conditions, and what should have been done towards icing the car in question, but, where the evidence is conflicting, the finding of the trial Judge,--- The jury having been waived ---will not be disturbed where no errors of law have intervened, unless such findings are against the manifest weight of the evidence, even though the Appellate Court cannot say its findings on the evidence as disclosed by the record would have been the same as that of the trial court. *Lehman vs. Rothbart*, 159 App. 270; *Richmond vs. Connor*, 179 App. 105."

The defendant complains that the court admitted improper evidence at the hearing. Our courts have repeatedly held that, if there is sufficient proper evidence on which to base a verdict in a case, the admission of improper evidence is not reversible error, especially is this true when a jury is waived and the case is heard by the court. "*Knight vs. Collins*, 227 Ill. 348; *Krieling vs. Northrup*, 215 Ill. 195."

We are of the opinion that there was sufficiently proper evidence on which the learned trial Judge based his findings for the plaintiff in this case, and that it will be presumed that the trial court considered only the competent

evidence in arriving at his findings. "Knight vs. Collins; Krieling vs. Northrupp,"supra.

Complaint is also made that the trial court erred in not holding and refusing to hold the propositions of law on behalf of the plaintiff and defendant. In the case of Boyle vs. Boyle, 247 Ill. App. 554, at page 558, we held, "At the close of the evidence in the case, propositions of law were submitted by the defendant which the court failed to mark 'held' or 'refused'." "The purpose of submitting these propositions was to determine whether the trial Judge entertains correct views of the principals of law involved in the proceeding, and, hence, they are unnecessary where the ruling of the court itself showed the principals of law which the court applied to the fact."

We are of the opinion that the learned Judge of the trial court entertained correct views of the principals of the law involved in this proceeding and properly applied the same to the facts as shown by the evidence in this case. Hence, there would be no error in holding or refusing to hold the propositions of law either on behalf of the plaintiff or the defendant.

We are of the opinion, from a review of the facts in this case, that the negligence of the defendant was the proximate cause of the plaintiff's damage, although the hurricane at Miama may have been a contributing cause. Under the law the defendant should be liable for damages due from their negligence. The judgment of the City Court of East St Louis, Illinois, is hereby affirmed.

AFFIRMED.

not to be reported.

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Withdrawn and
filed in full
order of court.
258 No. 3
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E
F ILLINOIS
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D. 1928.

AGENDA NO. 18.

249 I.A. 664⁴

APPEAL FROM THE CIRCUIT
COURT OF BOND COUNTY.

a Goff, the appellee herein,
n the Circuit Court of Bond
he appellant herein, to recover
labor as compensation for ser-
g a part of her minority. Such
household work in the home
wife during her last illness
he years 1923 and 1924. A
esulted in a verdict and judgment
f One Thousand Dollars.

gns as error in this Court the

overruling of his motion for a directed verdict made at the
close of appellee's evidence, which motion was renewed at the
close of all the evidence in the case; also, that certain in-
structions given to the jury are abstract in form, not appli-
cable to the facts shown by the evidence, and ignore issuable
facts presented for the determination of the jury.

In the year 1916, the appellee was eight years old
and a member of an orphans' home maintained by the Illinois
Children's Home and Aid Society, located at DuQuoin, Illinois.

683 / a. 100
IN THE
APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT
FEBRUARY TERM, A. D. 1928.

TERM NO. 24.

AGENDA NO. 18.

ADA GOFF,
Appellee,

VS.

MOSES W. ELAM,
Appellant.

249 I.A. 664⁴

APPEAL FROM THE CIRCUIT

COURT OF BOND COUNTY.

WOLFE, J.

In the year 1926 Ada Goff, the appellee herein, brought an action of assumpsit in the Circuit Court of Bond County, against Moses W. Elam, the appellant herein, to recover the reasonable value of work and labor as compensation for services by her for appellant during a part of her minority. Such services consisting of doing the household work in the home of appellant and waiting on his wife during her last illness were performed during parts of the years 1923 and 1924. A trial was had by a jury which resulted in a verdict and judgment for the appellee, for the sum of One Thousand Dollars.

The appellant assigns as error in this Court the overruling of his motion for a directed verdict made at the close of appellee's evidence, which motion was renewed at the close of all the evidence in the case; also, that certain instructions given to the jury are abstract in form, not applicable to the facts shown by the evidence, and ignore issuable facts presented for the determination of the jury.

In the year 1916, the appellee was eight years old and a member of an orphans' home maintained by the Illinois Children's Home and Aid Society, located at DuQuoin, Illinois.

This institution had the care, control and custody of the appellee at that time. The appellant was engaged in farming and lived in the country near Smithboro, Illinois, with his wife, Cypha Elam, and his unmarried daughter. The latter married prior to 1923 and had her home, as did another married daughter, in the neighborhood of their parents' farm. Apparently about the year 1916 Cypha Elam and the said Illinois Children's Home and Aid Society signed an undated application for a child to be taken from the home of the society and to be placed in the home of herself and appellant. The name of the appellant also appears as a signer of the application, but the evidence bearing on the question whether it is his signature was conflicting and was a matter of controversy between the parties to the action.

The application was introduced in evidence and provides that during the time the child is in the custody of the parties bound by the application, they will furnish her comfortable and sufficient clothing; care and medical attention; will send her regularly to day school, Sunday school, and religious services; and provide faithfully for her well being, physical, mental and moral, and will treat her in all respects as if she was their own child.

Pursuant to the terms of the application the appellee was received in the home of the appellant sometime in the month of September, 1916, and was undoubtedly treated as a member of the family of appellant for several years. She was furnished with clothing, food and medical attention. She performed household duties in the Elam home. Appellee attended day school and Sunday school regularly until sometime in November, 1923, when she quit school to take care of Mrs. Elam who became bedfast, the latter part of October, or the forepart of November of that year, the exact date of the commencement of such illness not being shown by the evidence. The appellee claims no compensation for services rendered for appellant prior to the latter part of October,

1923.

At the beginning of the day school in September, 1923, the appellee was sixteen years of age and she had finished the seventh grade of the school located at Smithboro. She attended school during September and October irregularly, and on the days she was absent from school, appellee testified, she stayed at the home of appellant doing household work and taking care of Mrs. Elam. After November 16, 1923, her attendance in school ceased and she remained with the Elams, doing general household work in the Elam home and nursing Mrs. Elam. Such services continued until some time in October or November, 1924, when the appellee left the home of Mr. Elam. It is for services rendered during this latter period of time, extending from November, 1923, to November, 1924, that the appellee seeks compensation. The evidence is conflicting as to the amount of labor performed by the appellee.

The appellee testified that she did all of the house work including the scrubbing, cleaning, cooking, baking of bread three times a week, washing, and in addition she was engaged during the day and at night in nursing and attending to the needs of Mrs. Elam. It is uncontrodicted that during the time compensation is claimed, that Mrs. Elam was bedfast and required a great deal of attention. Appellee further testified that she was required to lift Mrs. Elam onto and off the nursery pan several times each day, turn her in bed frequently, rub her feet during the night, carry her water to drink, feed her, give her medicine, and carry out the papers on which Mrs. Elam spit. This testimony of the appellee is corroborated, to some extent, by other witnesses.

The testimony of the appellee relative to the amount and character of such work and labor is contradicted by the evidence of the appellant and his two daughters.

Appellee further testified that she was sufficiently

acquainted with the handwriting of the appellant to identify his signature; that she had seen him sign checks; that appellant's own signature was signed to the application for a child. Appellant, as a witness for the appellee, denied that he signed his name to the application; that he did not tell his wife to sign his name to the application and that he had nothing to do with getting girls from the said home, and that he did not want them at his home. He testified further "Mrs. Elam told me she had made an application for her, but she done her business and I done mine." Also, he did not think that an application had been made for appellee, but that the application was made for some other girls.

J. M. Daniels, cashier of the State Bank of Hoiles & Sons, testified on behalf of appellant, that he had seen Mr. Elam write, and seen his signature on papers once or twice a month, and in his opinion, the name of the appellant appearing on the application is not the signature of Mr. Elam.

From the foregoing testimony, it would appear that the status of the appellee in the Elam family, at the time of her entrance in the home of the appellant is not clear. If the appellant signed the application, which provided that the applicants should treat the child as their own and take her into their family, educate and support it as if it were their own child, appellant no doubt would have stood to the child in loco parentis upon her reception into the Elam home. Rosky v. Schmitz, 110 Wash. 547; 188 Pac. 493, 10 A. L. R. 133.

Appellant did testify that the appellee lived with him as a member of his family and that he furnished her with food, medical attention and clothing. Appellee testified that she went about the house of the appellant at her pleasure and that it was her home; that she ate at the family table; that she told Mr. Elam that according to the application he was to keep her in school and that appellant replied that she would



have to stay at home and take care of Mrs. Elam. Appellee never asked Mr. Elam for money to pay for taking care of Mrs. Elam. She further testified that she expected to be paid for her services after she quit school and worked, as she stated, as a maid and nurse for the Elams. According to her testimony, she asked Mrs. Elam in 1923 if she was going to pay her for nursing her and Mrs. Elam said, "No". The appellant and appellee during the time she rendered the services in question, occupied the same room with Mrs. Elam during the night time so both would be at hand to aid Mrs. Elam.

Counsel for appellee tried their case before the jury on the theory that the evidence showed an implied contract on the part of the appellant to pay for the services rendered by her for appellant, beginning the latter part of October or the forepart of November, 1923. If the evidence shows that the appellee was taken out of school, contrary to the terms of the application and was required to perform the duties of a nurse and servant in the Elam home to do other menial services about the house and was treated as a nurse and maid, then these facts are circumstances tending to prove the existence of such an implied contract. The gist of the action is, therefore, the circumstances under which appellee so lived and worked in appellant's family at the time the services were performed for which compensation is sought. Whether appellee was living as a member of the appellant's family or working there as a nurse and servant, was a question for the jury to determine, and it was essential that the instructions given to the jury should have been free from material error. *McCrory v. Lancaster*, 44 Ill. App. 212; *McMillan v. DeTamble*, 93 Ill. App. 65.

The rule governing cases of this character is laid down in the case of *Sherman v. Whiteside*, 190 Ill. 576, as follows: "In the ordinary cases of service rendered by one person

The first part of the paper is devoted to a general discussion of the problem of the origin of life. It is shown that the problem is one of the most important and most difficult in the history of science. The second part of the paper is devoted to a discussion of the various theories of the origin of life. It is shown that the most plausible theory is that of the origin of life from non-living matter. The third part of the paper is devoted to a discussion of the various theories of the evolution of life. It is shown that the most plausible theory is that of the evolution of life from non-living matter. The fourth part of the paper is devoted to a discussion of the various theories of the origin of man. It is shown that the most plausible theory is that of the origin of man from non-living matter. The fifth part of the paper is devoted to a discussion of the various theories of the evolution of man. It is shown that the most plausible theory is that of the evolution of man from non-living matter. The sixth part of the paper is devoted to a discussion of the various theories of the origin of the universe. It is shown that the most plausible theory is that of the origin of the universe from non-living matter. The seventh part of the paper is devoted to a discussion of the various theories of the evolution of the universe. It is shown that the most plausible theory is that of the evolution of the universe from non-living matter. The eighth part of the paper is devoted to a discussion of the various theories of the origin of the earth. It is shown that the most plausible theory is that of the origin of the earth from non-living matter. The ninth part of the paper is devoted to a discussion of the various theories of the evolution of the earth. It is shown that the most plausible theory is that of the evolution of the earth from non-living matter. The tenth part of the paper is devoted to a discussion of the various theories of the origin of the solar system. It is shown that the most plausible theory is that of the origin of the solar system from non-living matter. The eleventh part of the paper is devoted to a discussion of the various theories of the evolution of the solar system. It is shown that the most plausible theory is that of the evolution of the solar system from non-living matter. The twelfth part of the paper is devoted to a discussion of the various theories of the origin of the galaxy. It is shown that the most plausible theory is that of the origin of the galaxy from non-living matter. The thirteenth part of the paper is devoted to a discussion of the various theories of the evolution of the galaxy. It is shown that the most plausible theory is that of the evolution of the galaxy from non-living matter. The fourteenth part of the paper is devoted to a discussion of the various theories of the origin of the universe. It is shown that the most plausible theory is that of the origin of the universe from non-living matter. The fifteenth part of the paper is devoted to a discussion of the various theories of the evolution of the universe. It is shown that the most plausible theory is that of the evolution of the universe from non-living matter.

to another with the assent and approval of the person for whom they are rendered, the law raises the implied promise to pay; but where the family relation exists, the implication does not arise from the mere rendition of the services, and the law will rather infer that it was rendered on account of the mutual obligations between members of the same family. In such cases, an agreement to pay for services must be established either by proof of an express contract or facts from which an inference of such an agreement will arise. Such facts must justify the conclusion that the parties were dealing on the footing of contract, and that both parties expected the services to be paid for." To the same effect are the cases of *Heffron v. Brown*, 155 Ill. 322; *Finch v. Green*, 225 Ill. 304; *Collar v. Patterson*, 137 Ill. 403. This rule is applicable where a minor sues for services rendered his foster father who had taken him into his family under an agreement to rear him as his own child. *Deppen v. Personette*, 93 Ill. App. 513. And in the case of *Smith v. Birdsall*, 106 Ill. App. 264, we find the rule stated as follows: "A person standing in loco parentis cannot recover for the support and care of the child nor can the child recover for services rendered to the parent, unless there was an express contract between them for such compensation, or unless the contract for such compensation be established by proof of such facts and circumstances as show that both parties at the time the services were rendered contemplated or intended pecuniary recompense other than that which arises entirely out of the family relation. This means more that the mere promise to pay which the law implies where one person does work for another with the knowledge and approbation of the other. Such implied promise is refuted by the relationship between the parties. To establish a contract by facts and circumstances the evidence must show that when the services were rendered both parties expected them to be paid for--the one expecting to

receive payment and the other to make payment at the time the services were rendered."

Among other instructions the trial Court gave, on behalf of the appellee, the following:

No. 1. "The Court instructs the jury that when one person labors for another with knowledge and consent, and the latter voluntarily takes the benefits of such labor, then the law will presume that the person doing the labor is to be paid for his, or her, labor unless the contrary is shown by the evidence; and if no special contract is provided for fixing the price, then the person doing the labor is entitled to have what his or her services are reasonably worth."

No. 7. "The court instructs the jury, as a matter of law, that the husband is liable for the necessary household expenses and in this case if you believe from the evidence that the plaintiff rendered services in taking care of and nursing Cypha Elam while she was the wife of the defendant, then in that case, such services are necessary household expenses."

Instructions Nos. 1, 2, and 6, were erroneous for the reason pointed out in the case of *McCrary v. Lancaster*, 44 Ill. App. 212. In passing on an instruction of a similar nature as those in this case, the court in the case just cited said: "This instruction is bad, inasmuch as it confines itself to the proposition as to whether the services sued for were rendered at the request of appellant's wife and accepted by the appellant, and entirely ignores the other proposition, for the jury to ascertain from the evidence as to whether she went into the family as a member thereof and for a home, or some other inducement than a pecuniary one for her labor." We do not think that the error in these instructions were cured by any other instructions given in the case, for although the law may be stated correctly in some of the instructions this will not cure material defects in others, in a close case, as the jury will be free to accept the erroneous instruction of the Court. *Wall v. Wall*, 69 Ill. App. 389;

McMillan v. DeTamble, 93 Ill. App. 65. We think that instruction No. 7. is subject to the same objection as those pointed out in the other instruction just quoted. The appellant also objects to the other instructions given on behalf of appellee, but we are of the opinion that the law as there stated is substantially correct.

The Court is aware that the appellee is suing for her services performed while she was a minor, and the Courts will look closely to a minor's protection. This doctrine of the law meets with the approval of this court. However, we are of the opinion that the rule governing a case of this kind has been definitely established by the decisions of the courts of our State as above quoted and cited.

We are of the opinion that upon appellee's theory, there was sufficient evidence to submit the case to the jury, under proper instructions of the Court, and that justice requires that this case be reversed and remanded. The judgment of the Circuit Court of Bond County is hereby reversed and the cause remanded.

REVERSED AND REMANDED.

Not to be reported.

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CLERK OF THE APPELLATE COURT
FOURTH DISTRICT ILLINOIS

IN THE
APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT

FEBRUARY TERM, A. D. 1928.

TERM NO. 25.

AGENDA NO. 21.

JOE CAMPANELLA,
Appellant,

VS.

ILLINOIS POWER AND LIGHT
CORPORATION, a Corporation,
Appellee.

:

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:

:

249 I.A. 664⁵
APPEAL FROM THE CIRCUIT

COURT OF PERRY COUNTY.

WOLFE, J.

The plaintiff brought his action against the defendant in the Circuit Court of Perry County to the May Term, 1927. The case was tried at said May Term of court before a jury. The defendant submitted a motion and an instruction to the Court at the close of the plaintiff's testimony, requesting a directed verdict, which instruction was refused. A similar motion and instruction were submitted by the defendant at the close of all the testimony offered in the case. The motion at that time was granted and the instruction given directing a verdict in favor of the defendant. The jury by their verdict found the issues in favor of the defendant. Motions for a new trial and in arrest of judgment were overruled, but no judgment was entered in the case.

The plaintiff perfected an appeal to this Court at the October Term, A. D. 1927, which cause was reversed and remanded on the discovery that no judgment had been entered in the case by the trial court. At the November Term, A. D. 1927, of the Circuit Court of Perry County, the defendant made a motion to enter a true and correct judgment in said case nunc pro tunc as of the May Term, A. D. 1927 of said

Court. The Plaintiff entered a cross motion to strike the cause from the docket. After a hearing on the respective motions the Court entered judgment in favor of the defendant and denied the motion of the plaintiff, and directed the Clerk of the Court to enter judgment upon the records in full and proper form in favor of the defendant and against the plaintiff in bar of the action and the costs of said suit against the plaintiff as of date of August 1st, 1927, and as of May Term of said court, A. D. 1927. To which entry of judgment plaintiff duly excepted and prayed an appeal to this Court.

The plaintiff assigned as error that the Court had no jurisdiction to enter a nunc pro tunc judgment as of the May Term, A. D. 1927, his main contention being that there was no record nor memoranda of any record, either by the Clerk or by the Judge, for which the nunc pro tunc judgment could be legally entered.

The Court had no right to enter a judgment nunc pro tunc at a subsequent term unless judgment was in fact entered at a previous term and was not entered of record through some fault, neglect or over-sight of some one whose duty it was to record such judgment, or, unless there are some minutes, or papers in the record that show that such order was in fact made. (People v. Rosenwald, 266 Ill. 548-554; Stein v. Meyer, 253 Ill. 201; People v. Wilmot, 254 Ill. 554.

We are of the opinion that there was not a sufficient record or memoranda of such record, to authorize the trial Judge to enter a nunc pro tunc judgment as of May Term, A. D. 1927, but we see no reason why judgment should not be entered on the verdict at a subsequent term of Court.

The judgment of the Perry County Circuit Court is hereby reversed, and it is hereby directed that judgment be entered on the said verdict in open court, at the next term of the Perry County Circuit Court.

REVERSED AND REMANDED WITH DIRECTIONS.

Not to be reported.

633
IN THE
APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT

MAY TERM, A. D. 1928.

FILED
JUL 14 1928
COURT
ILLINOIS

TERM NO. 3.

AGENDA NO. 13.

ILLINOIS MIDWEST JOINT
STOCK LAND BANK,
Defendant in Error,

VS.

GEORGE J. MC MAHON, et al.,
(George J. McMahon,
Plaintiff in Error.

: 249 I.A. 665¹
:
: ERROR TO THE CIRCUIT
:
: COURT OF EDWARDS COUNTY.

BARRY, P. J.

The question presented in this case is identical with that in Term No. 4 at the present term of this Court between the same parties. For the reasons stated in the opinion in that case, the order confirming the Master's report of sale in the case at bar must be confirmed.

ORDER CONFIRMED.

Not to be reported.



STATE OF ILLINOIS.
APPELLATE COURT,
FOURTH DISTRICT.

MAX TERM A. D. 1928.

FILED

CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

TERM NO. 8.

AGENDA NO. 16.

249 I.A. 665²

JOHN OWENS, Appellant.

VS.

S. T. SANDERS,
Special Administrator, etc.)
Appellee.

APPEAL FROM CIRCUIT COURT
OF
MADISON COUNTY.

Barry, P. J.- Edmund Owens and John Owens were bachelor brothers who lived together for many years. Edmund owned a small 40 acre farm and was blind for more than thirty years. He died September 24, 1926 at the age of 78. John rented the land from his brother and for many years each assisted in the cooking and house-keeping. John paid no board and so far as the record shows he received no compensation for his services. Following the death of Edmund, appellant filed a claim against his estate for the sum of \$5,000.00 for services alleged to have been rendered the deceased in caring for him by reason of his blindness and sickness.

The presumption that services rendered by a member of the family were gratuitous, may be overcome by proof, either of an expressed contract, or of a contract established by such facts and circumstances as show that both parties contemplated or intended pecuniary recompense other than that naturally arising out of the family relation; Haffron vs. Brown, 155 Ill. 322.

Catherine Owens, a niece of the claimant, testified that she had known the parties for about twenty-six years; that she was at the home of Edmund Owens about four days before he died and that she heard him say to the claimant that he was well satisfied with the way he had things fixed; that he wanted claimant to have what he had when he was dead and gone for taking care of him; that about three weeks before Edmund died, he said he wanted claimant to have everything he had; that he should not worry when he was dead and gone; he should have all he had for taking care of him; that those statements were made to claimant; that witness heard the deceased make statements ^{about those matters} to claimant at other times, all through the years; that when deceased would send to town to buy anything he said for claimant not to worry, for there would be plenty left for him when he was dead and gone.

Zeph Owens, a cousin of the parties, testified that he had a conversation with Edmund Owens in April or May, 1926, with reference to ~~how~~ claimant was to be paid for his services and that the deceased said he wanted claimant to have the place as long as he lived.

Nancy Fritchie, testified that in the fall of 1925 she had a conversation with Edmund Owens in which she said to him:- "Well, poor old John, he works like a mule," and that Edmund replied:* "Yes, well, I am going to remember him; I have got everything fixed in black and white; he will get what I have got, but, there are three in the family I am going to remember," and he ^{came} up and told her who they were; that he said he had a little cash and that he was going to remember Wesley Owens, Nottie Sanders and Ada Fry. She says that Jennie Owens then came up the hill and Edmund said, "We will talk after a while," and he said:- "I have got things

fixed and I am satisfied; I have it in black and white."

We find no other evidence in the record bearing upon the the question of the compensation, if any, appellant was to receive for his services. There is no evidence that appellant at any time said or did anything to indicate that he expected his brother to pay him for his services or that he intended to make a charge therefor. There was no express contract. In the absence of an express contract the evidence must show that when the services were rendered, both parties expected them to be paid for; *Miller vs. Miller*, 16 Ill. 296; *Heffron vs. Brown*, supra.

Practically all of the conversation testified to by Catherin Owens, occurred within the last three weeks of Edmund's life. While she testified to statements made prior to those last referred to, yet they were of a very general nature and insufficient to prove a contract. Zeph Owens simply says that in April or May, 1926, Edmund told him he wanted claimant to have the place as long as he lived. It is unnecessary to repeat the testimony of Nancy Fritahie. At most it simply shows that Edmund Appreciated his brother's services, and that he intended to remember him for what he had done.

The facts relied upon by claimant to establish a contract are of the same general nature as those which were held to be insufficient in *Collar vs. Patterson*, 137 Ill. 403. In that case a witness testified that she heard several conversations between the claimant and the deceased as to what the deceased intended to do for the claimant; that the last conversation was about two weeks before the death of the deceased; that deceased said:- "I wish I could do now as I could a few years ago," and the claimant asked why; that he said he would make a deed for more land than he had given her, that she had done more

for him than anybody else ever had, but he had made provision for her, that she would have plenty in her old days, that she had taken care of him as a child would have done, and that he thought if anybody ought to have anything that belonged to him she ought to have it, that she had stayed there and done all the work, and nursed him when he was sick, that he had never given her anything to amount to anything, and that he wanted her to be paid for what she had done. In that case the court said:- "This evidence not only fails to show an acknowledgment on his part to pay a debt, but clearly shows that the deceased did not understand that any indebtedness existed in claimant's favor against him, in the sense of a legal liability."

Under the law and the evidence we are of the opinion that the court did not err in directing a verdict at the close of appellant's evidence. The judgment is therefore affirmed.

AFFIRMED.

not to be reported.

IN THE
APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT
MAY TERM, A. D. 1928.

FILED

JUL 18 1928

Robert B. Nov
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

TERM NO. 42.

AGENDA NO. 1.

EUGENE SAUGET,
Appellant,

VS.

EAST SIDE LEVEE & SANITARY DISTRICT,
Appellee.

)
) APPEAL FROM THE CIRCUIT
) COURT OF ST. CLAIR COUNTY
)

249 I.A. 665³

BARRY, P. J.

Appellant sued to recover damages alleged to have been caused by appellee by reason of water escaping from its canal and sub-canal and spreading over appellant's land. The cause was tried before a jury and at the conclusion of appellant's evidence the court directed a verdict in favor of appellee.

Counsel for appellant, in their statement of the case, say that the particular negligence complained of is that appellee by its system of drainage caused water to flow over appellant's land which had never done so before. In other words appellee had diverted the natural flow of the water. In their argument of the case counsel made the following statement:-

"The negligence complained of consists of permitting the valve in the levee above the Missouri Pacific Railroad to remain open long enough for the water from the canal to flow through the valve into the sub-canal and over the land right east of the Missouri Pacific Railroad, thence after accumulating, to flow under the Missouri Pacific Railroad and over the land lying between that railroad and the East St. Louis, Columbia & Waterloo line and hard road."

The evidence shows that appellant's land is bottom



land and subject to overflow before the canal or sub-canal was constructed. If appellee diverted the water from its natural course and thereby caused water to flow over and upon appellant's land which would not have reached that land in the course of nature, or if by such diversion the overflow and consequent injury to crops, etc., were increased there by appellant would have a cause of action; Sanitary District v. Ray, 199 Ill. 63-67.

We find no evidence in the record legally tending to show that appellee diverted any water from its natural course or caused any water to reach appellant's land that would not have gone there in the course of nature. The evidence shows that in 1903 there was no canal and no sub-canal. The statute under which appellee was organized did not become a law until 1907 and while it does not appear in what year appellee was organized it is quite evident that it was some time subsequent to 1907. In 1903 the river stage was 33 feet, while in May, June and July 1927 it was 36 feet. The damages sought to be recovered were alleged to have been sustained by appellant during the spring and summer of 1927. Appellant testified that in 1903, when the river stage was three feet lower than in 1927, the water upon his land was five feet deep. In 1903 the water followed its natural course. He testified that in 1927 the water on his land was from six inches to three or four feet deep. It is quite apparent therefore, that appellant did not cause water to flow upon his land which had never gone there before. That being true he failed to establish a cause of action and the court did not err in directing a verdict in favor of appellee.

JUDGMENT AFFIRMED.

Not to be reported.

The following table gives a summary of the results of the
 investigation of the effect of the temperature of the
 water on the rate of the reaction between the
 hydrogen peroxide and the potassium iodide solution.
 The results are given in the following table.

The results of the investigation of the effect of the
 temperature of the water on the rate of the reaction
 between the hydrogen peroxide and the potassium iodide
 solution are given in the following table.

TABLE I

IN THE
APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT
MAY TERM, A. D. 1928

FILED
JUL 10 1928
COURT
ILLINOIS

TERM NO. 11.

AGENDA NO. 2.

GLADYS E. MERKER,
Appellant,

VS.

ALTON & SOUTHERN RAILROAD COMPANY,
Appellee.

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2491A.665⁴

APPEAL FROM THE CIRCUIT

COURT OF ST. CLAIR COUNTY.

NEWHALL, J.

This is an appeal from the judgment of the Circuit Court directing a verdict for appellee, at the close of all the evidence, in an action of case brought by appellant to recover damages for injuries sustained by her while endeavoring to cross appellees tracks in State Street in East St. Louis.

The original declaration charged general negligence to which a plea of not guilty was filed.

The evidence upon the part of appellant shows that on November 21, 1925 at one o'clock A. M. appellant and her husband were driving in an automobile east in State Street. Appellees tracks extend across State Street in a northerly and southerly direction. On the south side of the street there was located a brick building about seventy-five feet west of the crossing, and between this building and the crossing was a coal office about twenty-five feet from the south side of State Street. On the north side of the street, near the crossing is a small building used as a waiting station for street car patrons. For a distance of two blocks west of the waiting station, there were no other buildings to obstruct the view of appellees tracks to the north of state street. Immediately west of appellees main tracks and south of state street a spur track upon which

a coal car was standing the morning of the accident. An electric arc light was suspended in the street about fifty feet west of the crossing. Two street car tracks occupy a space of about twenty feet on State Street and on both sides of the car tracks was a concrete slab pavement about eighteen feet in width.

Appellant testified that she was driving her car homeward in an easterly direction on the south side of State Street, approaching the tracks of appellee where they cross State Street; that she was familiar with the crossing and knew the surrounding conditions; that she could not see any distance at all to the right down the railroad track and that is where she was looking to the right; that she proceeded until she got within fifteen feet of the crossing when she saw the engine of appellee; that she then stepped on the brake, turned her car to the right and the engine struck her car on the left side ^{that she} and her husband by reason of the collision were thrown through the right door of the auto onto the pavement. The auto after the collision remained in gear with power on and was pushed on with the engine to the south side of State Street where it was jammed between the engine and the standing coal car on the spur track and as a result the car was wrecked beyond repair; that appellant suffered bodily injuries as a result of the accident which required medical attention. That prior to seeing the train she hadn't heard anything; didn't hear any bell ringing or whistle blow.

On cross examination appellant stated there was a light on the east side of the crossing near the waiting station and that she saw the glare of the light over the crossing; that in coming out State Street she drove about twenty five miles per hour; that she did not see any light until she got within fifteen feet of the tracks; that she looked to the left when she was about twenty feet back from the track and did not see any-

thing; that at 42nd Street (which is 150 feet west of the crossing) she was going twenty-five miles an hour and slowed down to fifteen and threw her car into second gear and when twenty feet from the crossing was going about ten miles per hour.

Charles Merker, husband of appellant, testified that he was riding with appellant on the right front seat of the auto; that he first saw the engine when it was crossing the north street car track, when his wife applied the brake and turned the auto to the right; that he did not see any lights, hear any bell or whistle; that there is a street arc light between the brick building and the crossing; that the speed of the auto was reduced to five miles an hour when it was turned to the south by appellant; that there was no obstruction on the north side of the street except the street car waiting station which was about twenty five feet from the railroad track, the building being an open one about twelve feet high and five feet deep.

The witness Dennis testified on behalf of appellant that he was driving east on State Street, when appellant passed him going about twenty miles per hour up to the crossing; that he followed appellant and was about fifteen feet in the rear when they approached the crossing; that he slowed down pulled over to the curb and stopped; that appellant put on her brakes swerved to the right and the railroad engine struck the side of appellant's auto; that the train was on the road when he first saw it; that he did not hear any bell or whistle; that his car stopped about twenty feet from the crossing; when appellant applied her brakes she was going about twenty miles per hour; that there is a light about fifty feet from the crossing at 42nd and State Street that after you go past the light there is nothing to obstruct the view as to the approach at the crossing; that when he first saw the engine appellant's car was about sixty feet from the crossing and the engine was then at the car tracks; that when

the engine struck appellant's car it was about twenty-five feet from where it was when he first saw it; that the appellant's car traveled about sixty feet while the engine was traveling twenty-five feet.

The testimony on behalf of appellee consisted of four members of the train crew and three witnesses who were seated in an automobile that was parked on the west side of the crossing, waiting for the train to pull over the crossing. The car in which they were seated was about thirty feet from the crossing and they testified that they heard appellant's car come from the rear at about thirty-five miles per hour; that it struck the side of the engine when it was just about across the street; that there was no obstruction to the view on the north side of the street for a distance of two blocks west of the crossing; that the train consisted of an engine and seventeen cars and was traveling at about five miles per hour when it crossed State Street.

At the close of appellant's evidence and again at the close of all the evidence appellee moved the court for a directed verdict in its favor. The instruction was refused at the close of appellant's evidence and was given at the close of all the testimony.

After the filing of the original narr an additional count was filed, to which a demurrer was interposed and then appellant withdrew the additional count. At the close of the evidence a request was made to refile this additional count, which was denied and at the same time leave was asked to file a second additional count charging wilful and wanton negligence which request was also denied. Appellant contends that the court erred in denying leave to file the additional counts; that the court erred in directing a verdict for appellee and in refusing to admit certain evidence offered after the court had indicated it would direct a verdict for appellee.

In our view of the case, it is unnecessary to discuss the evidence with relation to the negligence of appellee. There is a direct conflict in the evidence in the question of whether a whistle was blown or a bell sounded in compliance with the statute. There is, however, no conflict with respect to the unobstructed view of appellee's tracks on the north side of State Street.

The serious question relates to whether or not appellant was guilty of contributory negligence which was the proximate cause of the accident.

Appellant testified that she approached the crossing in question at a speed of twenty miles per hour which was in violation of the provisions of Section 161 of the Road and Bridge Act which requires every person approaching any highway crossing a railroad at grade to reduce the speed of their vehicle to a rate of speed not exceeding ten miles per hour.

Appellant further stated that she was familiar with the crossing in question, that she did not make any observations to the north side of State Street until within twenty feet of the crossing, and first saw the train approaching from the north within fifteen feet of the crossing and then she endeavored to stop, but it is evident that on account of the excessive speed she was unable to avoid a collision. The witness Dennis who was traveling fifteen feet in the rear of appellant observed the train coming on to the crossing when appellant's car was sixty feet therefrom, and he, altho going at the same speed as appellant, brought his car to a stop twenty feet from the crossing; that he saw the train travel a distance of twenty-five feet across the street and during the same interval appellant's car traveled sixty-feet nearer to the crossing.

On a motion to direct a verdict only that evidence

can be considered which is in favor of the party against whom the motion is directed, and that evidence must be considered in the light most favorable to that party, together with all legitimate inferences which may be drawn from it in his favor.

Shannon vs. Nightingale, 321 Illinois 168.

It is a generally recognized fact that railroad crossings are dangerous places, and it is the settled law in this state that one who approaches a railroad crossing must approach it using an amount of care commensurate with the known danger. Burns v. Chicago & Alton Railroad Company 223 Illinois Appellate 439.

When there is no conflict in the evidence and the court can clearly see that the injury was the result of the negligence of the party injured, it is the duty of the trial court to instruct a verdict for the defendant. (Reidler vs. Dranshaw 200 Illinois 425. Goodman vs. Chicago & Eastern Ry. Company, 248 Ill App. 128.)

We have come to the conclusion that appellant did not prove that she was in the exercise of due care and caution for her own safety at the time of the accident, and therefore not entitled to recover under the evidence and that the trial court did not err in instructing the jury to find a verdict in favor of appellee.

As to the contention that the trial court erred in refusing to permit appellant to file certain additional counts at the close of the evidence, it appears that these additional counts are not contained in the bill of exceptions and the clerk had no right to file and insert the same in the common law record. Leave was not granted to file the same and the contents of the additional counts with the ruling of the court denying leave to file could only be shown by a proper bill of exceptions. People v. Arnett 317 Ill. 425. Riley v. Lawson 164 Ill. App. 297. Harris v. Willis 209 Ill. App. 402.

For the reasons above stated the judgment of the circuit court is affirmed.

AFFIRMED.

Not to be reported.

FILED

JUL 10 1928

Robert B. Roe
CLERK OF THE APPELLATE COURT
FOURTH JUDICIAL DISTRICT OF ILLINOIS

IN THE
APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT
MAY TERM, A. D. 1928

249 I.A. 665⁵

TERM NO. 13.

AGENDA NO. 17.

BEN MERCK,
Appellee,

VS.

WILLIAM KLOESS,
Appellant.

:
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: APPEAL FROM THE CIRCUIT
:
: COURT OF ST. CLAIR COUNTY.
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NEWHALL, J.

Appellee brought a suit in assumpsit against appellant upon a note signed by appellant as endorser, and received a judgment for \$2266.

The declaration consisted of a special count and the common counts. Appellant filed a plea of non-assumpsit and a special plea alleging that the note was signed by him on the express agreement that he would not be called upon to pay the note out of his own funds, but that payment would be made from and out of certain accounts receivable, pledged to repay said note, and that sufficient of said accounts receivable were, in fact, collected to pay the said note.

Issue was joined and case tried before a jury, which rendered a verdict against appellant, and after motion for new trial judgment on the verdict was entered against appellant.

The evidence showed that the note sued upon bore date August 15, 1924, and was for the principal sum of \$10000.00, signed by the Hoerr-Adams Shoe Company, a corporation, as maker, and payable on demand to appellee; that G. D. Klemme, William Kloess (appellant), and Otto Adams signed said notes as endorsers; that appellee, Klemme, and Kloess were members of the board of

directors of said Shoe Company, and that the officers consisted of appellee, who was treasurer, appellant, secretary, and Klemme, the president.

The Shoe Company was in financial straits, and needed money to carry on its business, and appellee loaned the Company \$10000.00, and took the note in question with the aforementioned endorsers. The note on its face recited that "accounts in the sum of \$12500.00 are hereby pledged as collateral to secure the payment of this note."

The evidence does not show that any specified accounts were ever actually pledged or delivered to appellee. Accounts receivable belonging to the Company were from time to time collected and applied either by the bookkeeper or officers of the company in payment of debts other than the one in question. The Shoe Company became bankrupt in May, 1925, and from the assets of the Company there was paid on the note \$2546.98, leaving a balance unpaid of \$7870.00, of which balance Klemme and Adams each paid one-fourth part or \$1969.50. Appellee assumed and agreed to stand a one-fourth part of the loss, leaving a balance of one-fourth or \$1969.50, which was sought to be collected from appellant as co-endorser.

The evidence shows that for a time the original note was lost or misplaced, and that the parties executed duplicate notes, which had different signers, but, in view of the fact that the original note was found and suit brought thereon, the alleged circumstances concerning the making of the subsequent duplicate notes became immaterial under the issues presented here for consideration.

Appellant contends that, because the note recites that accounts were pledged as collateral, and that the Company had collected certain accounts receivable, and did not apply the same on the note in question, appellant was thereby released as endorser.

The evidence does not show that any specified or certain accounts, which could be identified or segregated, were ever, in fact, delivered to and came under the control or direction of appellee. It is true that appellee was treasurer and paid out moneys of the Shoe Company on other indebtedness that may have been collected from accounts owing the Company. On the other hand, the proof shows that appellant was secretary of the Company, and, to a certain extent, had control of the accounts of the Company, but that he never delivered or set aside any accounts to appellee as collateral for the note in question. It is apparent that the Shoe Company was in need of funds, and that whatever moneys were collected by the bookkeeper and treasurer were used by the Company to pay other company debts.

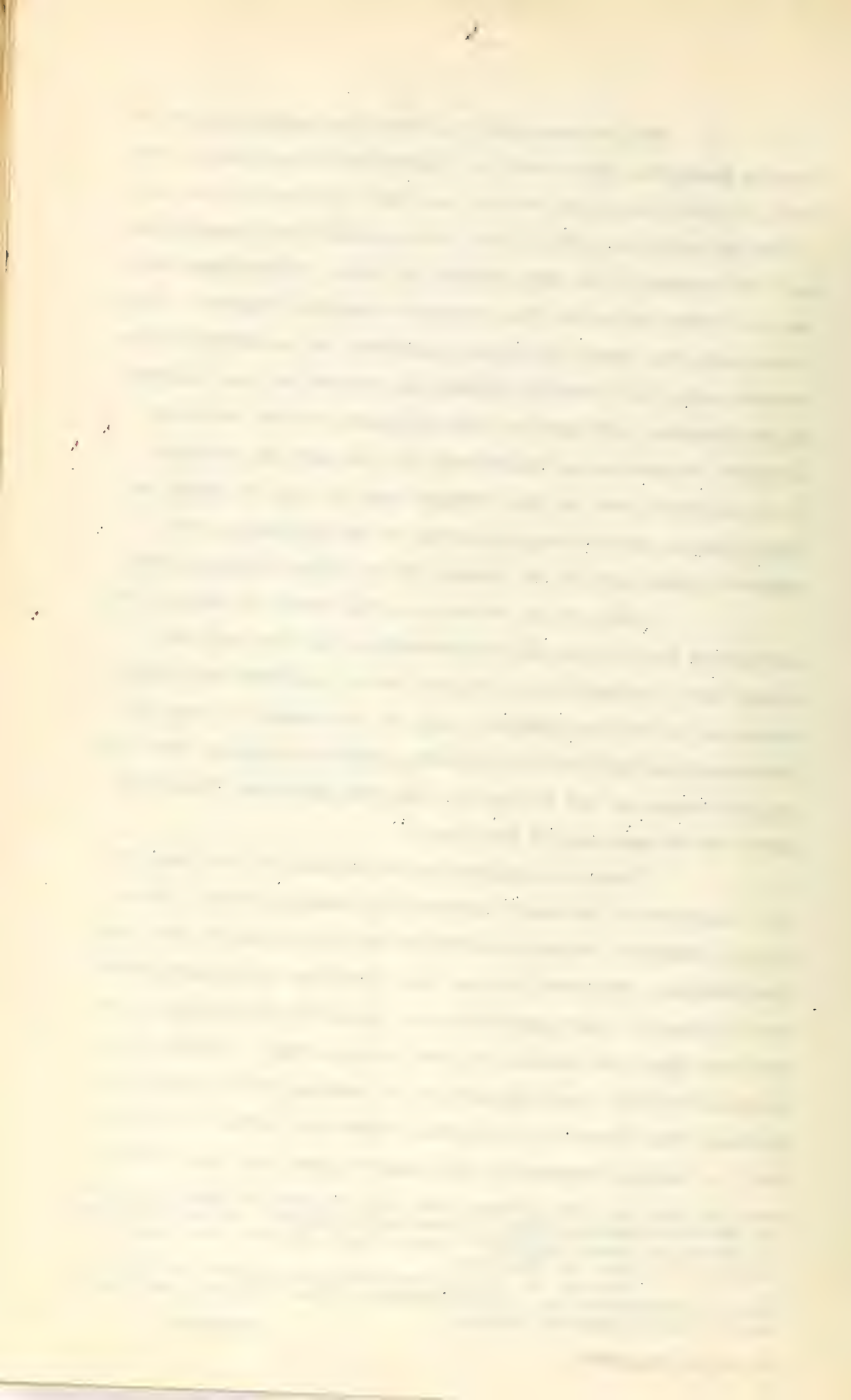
There is no evidence in the record to support the contention that it was the understanding when the note was signed that the same should be paid out of accounts receivable belonging to the Shoe Company, and, in the absence of any evidence showing that certain definite specified accounts were actually pledged, we are of the opinion that appellant failed to prove the allegations of his plea.

Error is assigned on the refusal of the Court to give appellant's "refused" instruction numbered three. There was no competent evidence in the record upon which to base this instruction. The proof did not show that any particular accounts were pledged or that appellant ever collected any moneys on any accounts that were alleged to have been pledged. We are of the opinion that the Court did not err in refusing this instruction. Evidence was offered as to certain facts set forth in the affidavit of merits attached to appellant's plea, but these facts were not put in issue by any plea, and are wholly immaterial to the issues presented here. These facts related to the execution of certain alleged duplicate notes, which are not sued upon or properly in issue in this case.

We are of the opinion that the judgment of the trial Court is supported by a preponderance of the evidence, and the same is accordingly affirmed.

AFFIRMED.

Not to be reported.



STATE OF ILLINOIS.
APPELLATE COURT,
FOURTH DISTRICT.

MAY TERM A. D. 1928.

FILED
COURT
ILLINOIS

TERM NO. 1.

AGENDA NO.12.

THE PEOPLE OF THE STATE
OF ILLINOIS.
Defendant in Error.

VS.

JAMES HORD,
Plaintiff in Error.

ERROR TO THE COUNTY COURT

OF

CLAY

COUNTY.

2491.A. 6661

Wolfe, J.- Plaintiff in error was convicted of the unlawful possession and unlawful sale of intoxicating liquor in the county court of Clay County. The information consisted of two counts. The first count charges the unlawful possession of liquor, and the second the unlawful sale thereof. The information was filed by the State's Attorney on the fourth day of August. On the next day thereafter, the defendant was arrested by the sheriff of Clay County. Previous to the trial counsel for the defendant filed a motion asking the court to order the sheriff to return to the defendant a certain five-dollar note, lawful money of the United States, taken by the sheriff from the defendant at the time or immediately after he was placed under arrest. His motion was denied. The defendant also entered a motion to quash the information, which was overruled. The next motion was for a bill of particulars, which was denied. This was followed by a motion challenging the array, based upon various grounds, which was also denied. Trial was had before a jury and the defendant was found guilty on

both counts. The judgment of the court was that he pay the sum of \$500.00 on the first count and a like sum on the second count and that he stand committed to the county jail for a period of sixty days. He took the case to the Supreme Court, alleging that a constitutional question is involved, in that he was denied his constitutional rights by the refusal of the court to enter an order requiring the return of a certain five-dollar note prior to the commencement of the trial. It appears that this five-dollar note had been marked by the State's Attorney of the county and given to the witness Cleo Crumbaker, who testified that she purchased whiskey with it from the plaintiff in error. It was found in his possession when he was searched by the sheriff after arrest. Plaintiff in error explained that he secured the bill from Cleo Crumbaker by changing the same, at her request, to money of smaller denomination.

In transferring this cause from the Supreme Court to this Court, the Court through Justice Stone says: "It is claimed by counsel for plaintiff in error that the search made by plaintiff in error and the seizure of the five-dollar note were in violation of his constitutional guarantee against unreasonable search and seizure, and that the money was not competent as evidence and should have been returned to him. This question has been frequently decided in this State. The rule laid down in the case is, that generally where an arrest is made by an officer who has reasonable ground for believing the person arrested is implicated in the crime, such officer has a right to arrest without a warrant and to search the person arrested without a search warrant. The guaranty of the constitution is not against all search and seizure but against unreasonable search and seizure, and does not extend to immunity from search on arrest. (People v. Swift, 319 Ill. 359; Lynn vs. People,

170 id. 527; North v. People, 139 id. 81; Gindrat v. People, 139 id. 103.) It has also been frequently decided in this State that this court will not entertain jurisdiction of an appeal or writ of error from this court on the ground that a constitutional question is involved when the question has been decided and settled by this court. (People v. Blenz, 317 Ill. 639; People v. Fonsky, 290 id. 612; People v. Powers, 283 id. 438.) The offense charged in this case is a misdemeanor. The punishment was by fine and imprisonment in the county jail. There are no constitutional questions involved in this review and no other questions giving this court jurisdiction."

The decision of the Supreme Court has disposed of the plaintiff in error's assignment of errors No. 2 and No. 4, adversely to the plaintiff in error, namely that his constitutional rights were not invaded, and the Supreme Court had no jurisdiction to hear the other part of the case.

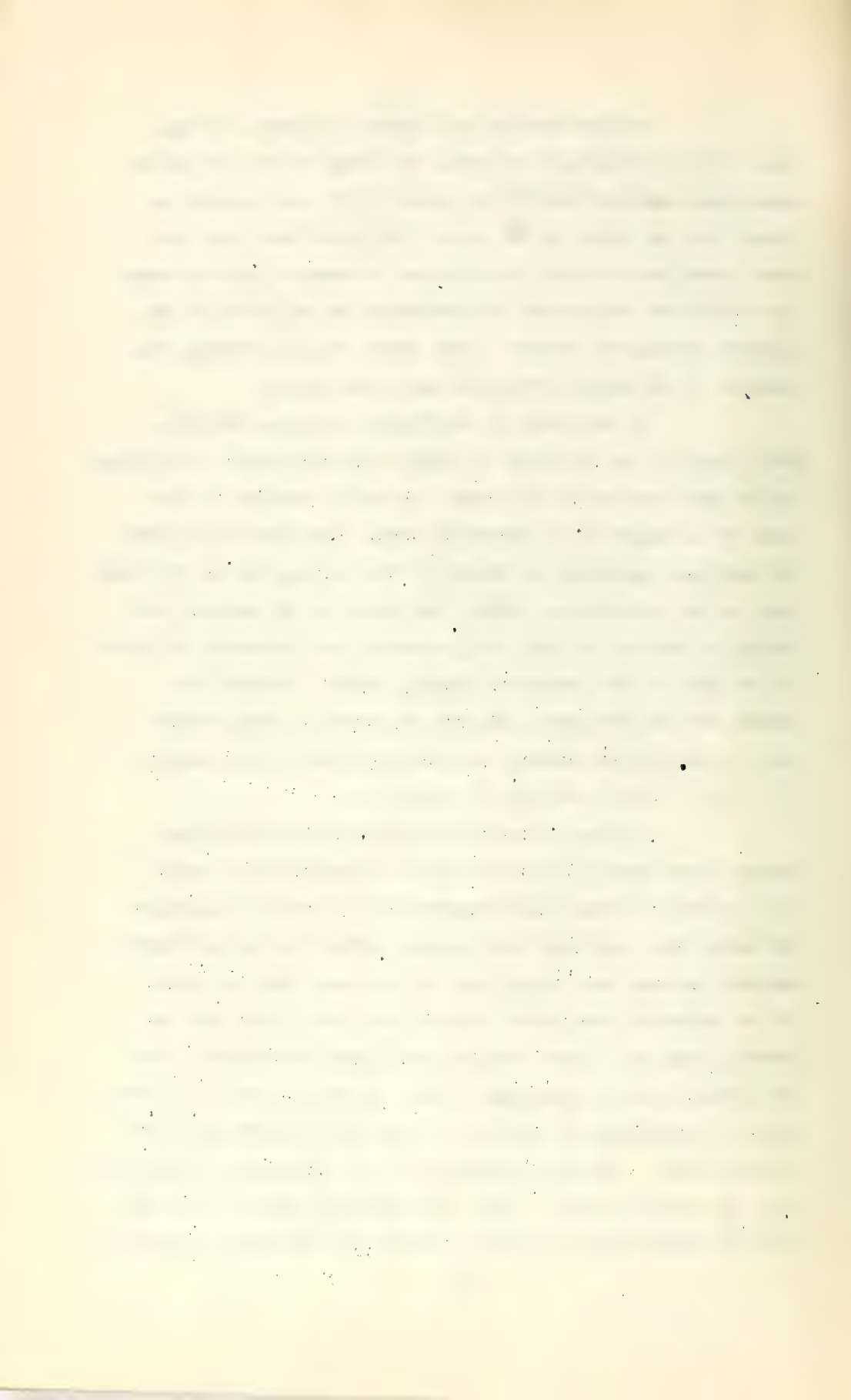
The plaintiff in error's first assignment of error is that his motion to quash the array should have sustained for the reason that the jury had not been properly drawn. On the first day of the June term A. D. 1927, of the Clay County, County Court, the records show that the Court found that a jury was needed for said term of court, and ordered a special venire for a jury of twelve men returnable June 21, 1927 at 10 o'clock A. M. This venire was served by the Sheriff of said County, and all the orders and endorsements thereon were in regular form. On August 4, 1927, the State's Attorney filed an information charging the defendant, James Hord, with the unlawful possession and sale of intoxicating liquor.

The selection of the jury was in the manner and form as provided by statute. It is not likely that the sheriff, at the time he selected this jury, had the defendant in mind or had the knowledge that the state's attorney was going to issue the information against him.

In the Case of the People v. Bishop, 225 App. 610, cited by Plaintiff in error, the Judge on his own motion appointed a special bailiff to select fifty men to serve as jurors for the trial of the case. The Court held that the trial court was without jurisdiction to order a jury so drawn, as neither the People nor the Defendant had objected to the sheriff serving the venire. When there is no objection, the sheriff is the proper person to serve the venire.

In the case of the People v. Orpiz, 320 Ill. 205, cited by the Plaintiff in error, the point that is involved is not the same as in this case. The only question in that case is in regard to an impartial jury. One juror had formed and expressed opinions in regard to the case, prior to the time that he was called as a juror. The point in the case of the People v. Maukas, 292 Ill. 435, cited by the Plaintiff in error, is the same as the People v. Bishop, supra. Neither the people nor the defendant made any objections to the sheriff serving the special venire, and the Court of his own motion appointed a special bailiff to serve it.

We are of the opinion that in this case the County Judge complied with the law in selecting this jury. It is a question whether the defendant has a right to challenge the array of a jury that was legally drawn when the information against him has been filed later in the same term of court. If the defendant felt that he could not have a fair and impartial trial by a jury that had been legally selected, then the burden would be upon him to show in what manner his rights would be prejudiced by having his case tried before that particular jury. The mere assertion of the defendant, in his motion that he could not have a fair and impartial trial by the jury selected would not be sufficient cause for the court to sustain



sufficient cause for the court to sustain his motion, or his challenge to the array. Especially is it true in this case where there is no showing in what manner he would be prejudiced by trying his case by the jury selected, nor that he exercised any or all of his peremptory challenges before accepting the jury. The record does show that the court on motion of the defendant appointed a special bailiff to select one juror to fill out the panel.

We are of the opinion that the trial court properly overruled the challenge to the array of jurors, and motion to quash the venire.

The Trial Court permitted the State's Attorney to amend the information. The defendant objected to the amendment for the reason that there was no motion to quash the information pending at the time the amendment was made. We know of no rule of law that would prevent the Court from allowing the State's Attorney to amend the information, and it was not error for the Trial Court to allow the State's Attorney to so amend; Long vs. People, 135 Ill. 435; People vs. Fensky, 297 Ill. 440.

We think there is no merit in the plaintiff in error's contention that the second count concluded "contrary to the form in the statute in such case made and provided." We are of the opinion that each count of the information properly charged an offense against the State, and there was no error in overruling plaintiff in error's motion to quash the information.

It is contended by plaintiff in error that the trial court erred in modifying his instructions by striking out the words in such a manner that the words stricken out may be read to the jury, also that the instructions as offered properly stated the law.

In *People v. Foster*, 388 Ill. 382, the same question was presented, and the Court says:

" Counsel for plaintiffs in error state that the practice of striking out words in instruction and permitting them to go to the jury in such condition that the words stricken out may be read has often been condemned by this Court. However they cite no authority in support of this statement. We have frequently held that it is no part of our duty to search for errors or enter upon an independent investigation of the court's own motion in order to find material upon which to base a judgment of reversal. (*Wickes v. Walden* 228 Ill. 56, and cases there cited.) While counsel have not pointed out and cited authorities in support of this position we have investigated the point in question. Section 74 of the Practice Act (*Hurd's Stat.* 1917, p. 2244,) in its wording seems plainly to imply that written instructions may be given as modified. Indeed, the only practical way, under this statute, to avoid this, would be for the trial judge to re-write every instruction that he wished to modify in any way, and with the numerous instructions that are frequently asked by counsel in criminal as well as civil cases, the practice of re writing all modified instructions by the trial judge would be found very difficult, if not impossible." The instructions as modified we think properly stated the law.

Whether the State shall be required to furnish a bill of particulars in a particular case and the character of such a bill rests in the sound legal discretion of the Trial Court. It is only in cases where it is a clear abuse of this discretion that the denial of such a motion is held to be error. *People v. Munday*, 280 Ill. 32. In this case each count of the information sets forth the exact offense with which the defendant was charged and we cannot see any way the defendant's rights were prejudiced by not having a bill of particulars.

Exception was taken to the giving of practically all the instructions offered by the People, and also exception was taken to the modification of the instructions of the defendant.

In the case of Wright v. Brosseau, 71 Ill. 391, the question of undue prominence given to under-scoring portions of instructions was before the Court. The Court held that it was bad practice to thus underline or underscore an instruction, as the jury might, under some circumstances, be led to believe that the Court intended to unduly emphasize some particular part of the instructions, but held it was not reversible error to do so, just bad form. In this case, we are of the opinion that the word "prima facie" should not have been underscored, but the underscoring of the words "prima facie" was not error.

Numerous objections are raised to the instructions that were given and refused, but on the whole, we are of the opinion that they fairly set forth the law applicable to a case of this character, and the defendant had a fair and impartial trial.

We find no reversible error in this case, and the judgment of the Court. Court of Clay County is hereby

AFFIRMED.

Not to be reported.

IN THE
APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT
MAY TERM, A. D. 1928

FILED

JUL 16 1928

Robert B. Rice
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

TERM NO. 5.

AGENDA NO. 15.

KING CITY BUILDING AND
LOAN ASSOCIATION,

Appellant,

VS.

THOMAS E. SUMMERS, ET AL.,
MAY E. BEAL, EXECUTRIX,
Appellee.

WOLFE, J.

249 I.A. 666²

APPEAL FROM THE CIRCUIT

COURT OF JEFFERSON COUNTY.

In the month of November, 1926, Sarah M. Beal, now deceased, entered into an agreement with Thomas E. Summers to sell to him a residence property in the city of Mount Vernon, Illinois, the purchase price to be, \$1600. It was further agreed that Mr. Summers would borrow as much money as he could on the property from the appellant and would pay Mr. Beal the proceeds of the loan. She would then take a mortgage on said lot for the balance of the purchase price due her.

On November 13, 1926, the King City Building and Loan Association made a loan on said property and issued its check payable to Sarah M. Beal for \$1100, the proceeds of the loan. Said check was cashed by Mrs. Beal on November 24, 1926. At the time the loan was made, Mr. Summers and his wife, Ida M. Summers, executed and delivered a mortgage on the premises in question to the King City Building and Loan Association to secure the loan so procured. On the same day Mr. Thomas E. Summers and his wife, Ida, executed a note and mortgage on the same property to Sarah M. Beal, in the sum of \$500, being the balance of the purchase money on said property. Both mortgages were filed for record November 13, 1926, the Beal mortgage

at 2:30 o'clock P. M. and the Building and Loan Mortgage at 4:00 o'clock P. M.

The mortgaged property is now owned by James Mc Gehee subject to both mortgages, and owing to unfavorable conditions, the property is alleged to be worth less than the amount of the mortgages.

On December 13, 1927, the Building and Loan Association brought suit to foreclose its said mortgage making parties defendant, Summers and his wife and McGehee and also Mary E. Beal, Executrix of the will of Sarah M. Beal, Deceased. The defendants were defaulted, except the Executrix, Mary E. Beal who answered the bill and filed a crossbill seeking to establish and foreclose the Beal mortgage as a first and superior lien. The crossbill was answered by the Building and Loan Association. The only issue tried before the Chancellor was that of priority of the mortgage liens. The chancellor heard the testimony, both oral and documentary, and decided that the complainant in the crossbill had a prior and first lien on the mortgaged premises, including solicitor's fees, etc, and that the complainant in the original bill had a lien on the said property, but subordinate to the lien of the crossbill, and ordered foreclosure, etc.

Upon the hearing of the case the Chancellor heard the evidence of Thomas E. Summers, who was the purchaser from Mrs. Beal of the mortgaged premises. Also the testimony of Guy A. Wood, who is the secretary of the Building and Loan Association. The evidence of these two witnesses was heard subject to the objection of the cross complainant. We find no ruling of the Trial Court as to whether he considered it as proper and competent evidence. We see no reason why each of these witnesses was not competent to testify in this case. The witness Summers had no interest in the property, and had been defaulted, so that his testimony would not affect his interests in any manner whatsoever, and the mere fact that he had been

made a defendant in the case, either by the original bill or the crossbill, would not disqualify him as a witness.--Pain v. Parson, 179 Ill. 185; Duffy v. Duffy, 243 Ill. 476; and the Northern Trust Company v. Sanford, 308 Ill. 381.

The witness, Guy A. Wood, being merely secretary of the company, and not a director, would be competent to testify to all matters pertaining to the case. Casey v. Sawyer Biscuit Company, 163 App. 145; S. C. Institute v. Avery, 157 Ill. 568. The secretary of a corporation, even though a stockholder, is competent to identify records and papers of a corporation. Nichols v. Cunningham Estate, 181 App. 190.

Thomas E. Summers testified that he was a carpenter and contractor, 67 years old, and lived in Mt. Vernon, Illinois; that on or about November 12, 1926, he made an agreement with Mrs. Sarah M. Beal by which he bought the property in question for \$1600. He was to improve the property and borrow money in the building and loan and she, Mrs. Beal, was to take (second) a mortgage; that he executed the building and loan papers in evidence, and paid to Mrs. Beal the proceeds of the loan, \$1100, after the expenses and three months' payments were deducted; that he got the money on the same or following day, the papers were dated, and that he gave the money to Mrs. Beal the day he got it. He also testified that on that day or the next day he made a second mortgage to Mrs. Beal for \$500. and left it with Mrs. Piercy. Some time later he traded the property to Joe Bailey. Mr. Summers identified the complainant's note and mortgage and the deed from Mrs. Beal to himself. They were all offered in evidence and made exhibits.

Guy A. Wood testified that he lived in Mt. Vernon, and was secretary of the complainant, Building and Loan Association, and had been for about five years; that the property in litigation was worth about \$1500.00. He testified as to the amount of indebtedness due the Association; that he knew Sarah M. Beal in her lifetime, and daughter May; that he and

business with Mrs. Beal; that May Beal is executrix of her mother's will. He also testified that he had a conversation with Mrs. Beal about the Summers loan at the time it was made. She said that Mr. Summers was getting with us, the first loan, and Mr. Summers was giving to her a second mortgage of \$500.00 the balance of the purchase money; that Mr. Summers was present during the conversation and at the time the mortgage by Summers and his wife to the Building and Loan Association was executed; that the mortgage was dated November 12, and the money delivered on the 13th.

It is the contention of the appellees that from the mere fact of the filing of their mortgage, prior to the time that the appellant association filed theirs, entitles them to a prior lien on these premises.

The object and purpose of recording a deed or mortgage is to give notice to the public generally of the fact of such conveyance being made. The parties may as between themselves make a valid agreement, though a verbal one, that one mortgage shall have priority over the other. If Mrs. Beal at the time she took her mortgage had notice of the existence of the mortgage of the King City Building and Loan Association, it would be just as effective as to her and her estate as the registering or the recording of the mortgage, as the priority between mortgages depends not alone upon the date of recording, but also upon the knowledge that the holders have as to the true state of facts as to the title. S.C. Institute Building and Loan Association v. Ayres, 177 Ill. 9; Sternback v. Leopold, 166 Ill. 44; and Slakes v. Riley, 121 Ill. 166.

We do not see how Mrs. Beal could receive the major portion of the purchase price of the real estate in question from the King City Building and Loan Association without being put upon the inquiry as to why the Building and Loan Association was making such payment. Mr. Summers and Mr. Wood

each testified that there was a definite understanding between the building association, Mrs. Beal and Summers at the time the mortgage was executed from Summers and his wife to the Building and Loan Association, that Mrs. Beal was to take back a second mortgage of \$500 for the balance of the purchase price. This evidence is in no way contradicted.

We do not deem it necessary to decide whether Norman A. Piercy the attorney was exempt from testifying in this case. There is competent proof in the record to sustain the contention of the appellant, that it was understood and agreed between the parties that the appellant's mortgage should be a first lien on the property, and that the appellee's mortgage was to be a second lien on the property.

The decree of the Circuit Court of Jefferson County is hereby reversed and the case remanded with directions that the King City Building and Loan Association mortgage be held to be a first lien on the property and the mortgage originally given to Sarah M. Beal, now deceased, be held to be a second lien on said property.

REVERSED AND REMANDED.

Not to be reported.

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FILED
JUL 10 1928
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

IN THE
APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT
MAY TERM, A. D. 1928

249 I.A. 666

TERM NO. 12.

AGENDA NO. 9.

BUFFALO INSURANCE COMPANY, :
of the City of Buffalo, New York, :
Appellant, : APPEAL FROM THE
VS. : CIRCUIT COURT
OF JEFFERSON COUNTY.
J. A. CARNAHAN, :
Appellee.

WOLFE, J.

On the 18th day of September, 1924, a policy of insurance was taken in the name of J. A. Carnahan, issued by the Buffalo Insurance Company of the City of Buffalo, New York, for \$1,500, on a stock of merchandise, consisting chiefly of groceries, and such other merchandise as is usually kept for sale in grocery stores, and \$500. on store and office fixtures, counters, etc.

The business was run in the name of J. A. Carnahan, & Sons, goods being bought and sold in that name; checks issued in payment of goods bought and used in the general course of business; checks, with which payments were made for goods purchased of wholesale houses; statements for such purchases were sent to J. A. Carnahan & Sons and checks issued and returned in payment for same, until after the morning of Sunday, April 25, 1925, when the stock of groceries, fixtures, etc., were destroyed by fire.

Plaintiff and his sons were continuously in charge of, conducting and managing the business until it was destroyed by fire. The circumstances surrounding the fire were of such a suspicious character that, on the 15th day of July, A. D. 1925,



John Carnahan, the son, and, as claimed by Plaintiff in error, a partner with his father in the business, was indicted by the grand jurors of Jefferson County Circuit Court, at the July Term of that court, and on April 29, A. D. 1926, by a jury, was tried and convicted of the crime of burning the stock of goods etc.

On December 23, 1925, plaintiff filed this suit to recover damages suffered by reason of the fire, and at the January Term, A. D. 1928, a trial was had by a jury, and a verdict returned in favor of the plaintiff and against the defendant for \$1,750 and costs of suit. Appellant defended the action, filing a plea of the general issue, upon which issue was joined, and three special pleas setting up the defense that a false statement was made as to the ownership of the property burned, the real owners, as alleged, being J. A. Carnahan & Son; that one of the partners, John Carnahan, burned the property, and was tried, convicted and sentenced to the penitentiary as punishment for committing the crime. The defendant, appellant here, brings this suit to the Appellate Court by appeal.

In the trial of this case, the appellant attempted to prove by the ledger accounts of numerous wholesale grocers, who had formerly had dealings with the plaintiff, that all of the accounts were carried in the name of J. A. Carnahan & Sons. On Objection of the plaintiff, the Trial Court refused to let the defendant introduce such evidence, and the defendant insists that this is reversible error. An examination of the record discloses that in the identification of these accounts it was testified without objection, that all of the accounts were carried in the name of J. A. Carnahan & Sons, and the plaintiff himself says he did business in that name. The defendant has had the benefit of all the testimony that these ledgers would have disclosed if they had been admitted as evidence, even if they

had been competent proof of that fact. We are of the opinion that the Trial Court properly excluded these ledger accounts from the jury. The statutory provisions in regard to the admission of ledger accounts are not applicable to this case.

Exception is taken to other rulings of the Court in admitting and rejecting evidence. We are of the opinion that there was no error in regard to the admission of evidence, and that the case was fairly submitted to the jury.

We think Instruction No. 4 of the plaintiff's in error properly states the law, that is, that the burden of proof is on the defendant to prove the matters that are alleged in the second, third and fourth pleas, and is not a matter to be established by the plaintiff. After the plaintiff had established a prima facie case by the introduction of his evidence, then the burden shifted to the defendant to defeat the action by establishing the proof of the matters as alleged in his special pleas; *Continental Life Insurance Co. v. Rogers*, 119 Ill. 475; *Phoenix Insurance Co. v. Stocks*, 149 Ill. 319.

Exception is taken to the remarks of the Trial Court, claiming that the jury was thereby prejudiced against the defendant, and by such remarks the Court invaded the province of the jury to determine what had been or what had not been proven. These remarks were the reasons given by the trial Court in sustaining an objection to a question asked by Counsel for Defendant. We cannot see any error in the Court's remarks, nor see what way the jury would be influenced against the defendant by these remarks.

Complainant's instruction No. 1 given by the Court is not subject to the criticism that the appellant gives it. That part of the instruction "that he is entitled to, not exceeding the sum of \$2,000" has been criticised frequently by the higher courts, but all the cases where this instruction has been

criticised, have been in personal injury suits, or cases of similar nature. In all of these cases the damages are more or less speculative, and the amount of damages, if any, is not what the plaintiff would be entitled to, but the amount of damage sustained by the plaintiff as shown from the preponderance of the evidence. The damage in such case is always more or less speculative, but in a case of this kind the damage is subject to exact proof, and not speculative, and in such cases we are unable to find any case where the court has criticised this kind of an instruction. We think the jury was not misled by this instruction.

Other instructions are criticised, also error is assigned for failure to give two instructions for the Defendant. The Court properly refused to give these instructions and we are of the opinion that the jury was properly instructed as to the law in the case.

We find no case that holds that it is reversible error in allowing the jury to take the declaration with them to the jury room and retaining it until they have reached their verdict, and then returning it into open court. In all the cases cited where the court has reversed the case, there have been other errors besides the taking of the declaration to the jury room. While it is not considered good practice to do so, the courts will not reverse a case on this ground. Especially is this true when the attorneys stand by and see it done and offer no objection at the time.

We are of the opinion that this case was properly submitted to the jury, and ~~it~~ is for them to decide the questions of fact in the case. Whether J. A. Carnahan was the sole owner of this stock of goods was a question for the jury to decide, and they by their verdict found that he is. There are other errors assigned, but we are of the opinion that there is no reversible error in this case, and the judgment of the Circuit Court of Jefferson County is hereby affirmed.

AFFIRMED.

Not to be reported.

Ill. Unpublished opinions
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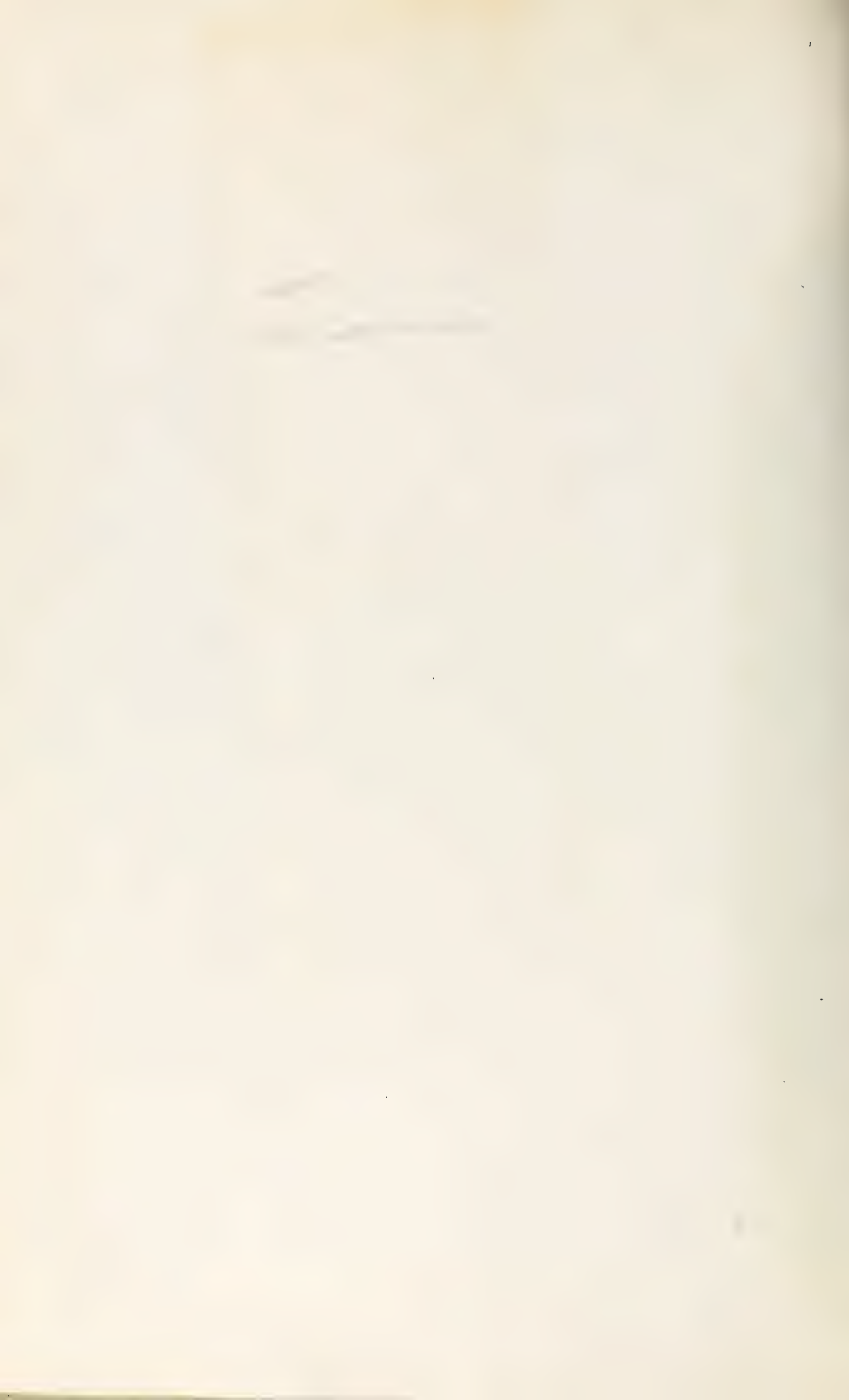
Borrower who signs this card is responsible for
the return of the book.
Not Transferable.
Not to be taken from the Reading Room.
Sign legibly.
Obey these rules and avoid fines.

Date _____ Name _____

Date _____

Name _____

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III. Unpublished opinions

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Borrower who signs this card is responsible for the return of the book.
Not Transferable.
To be taken from the Reading Room.
Legibly.
These rules and avoid fines.

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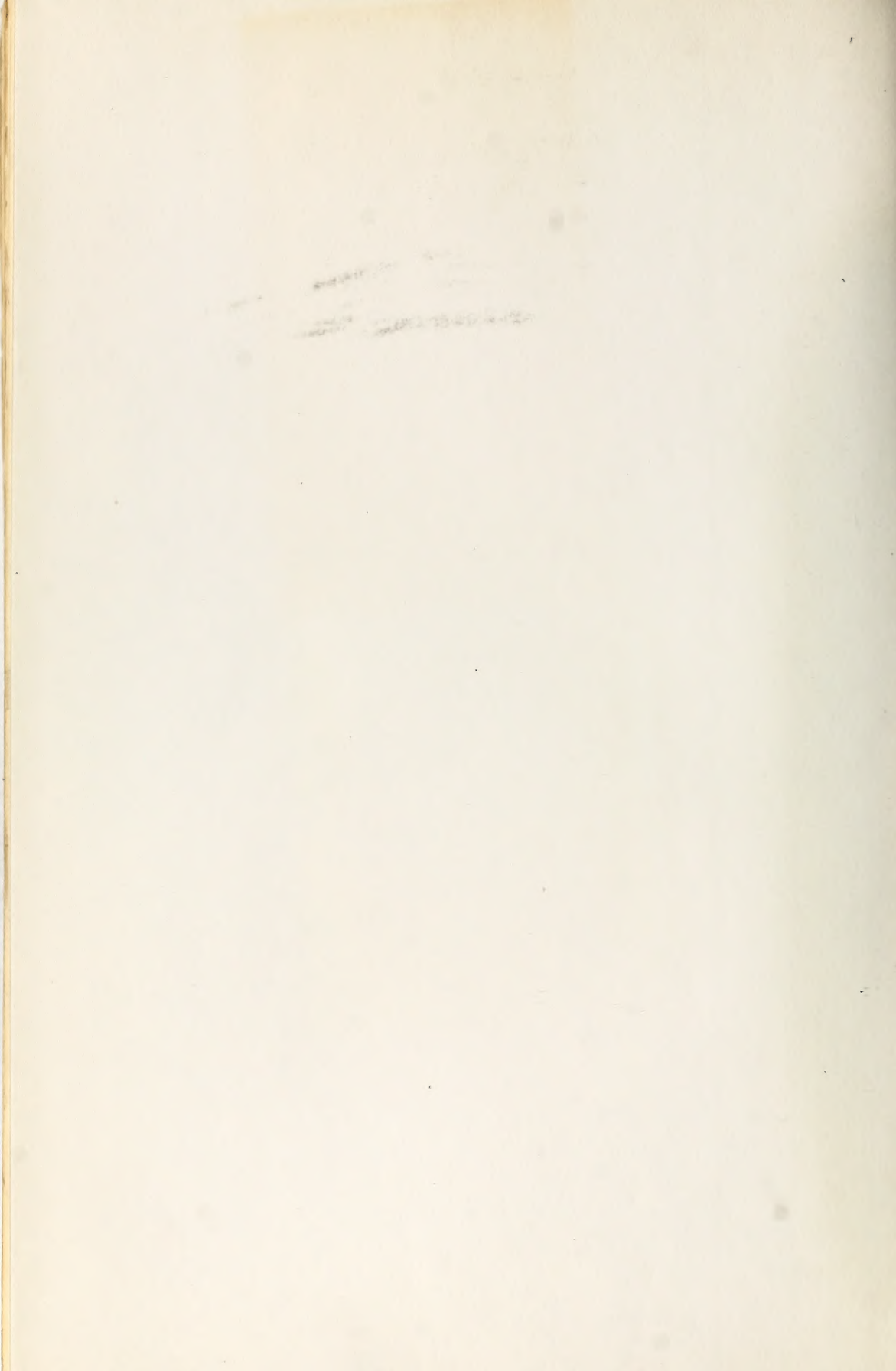
Not to be taken
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Sign legibly
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Date _____

Name _____



RESERVE BOOK

This reserved book is not transferable and must not be taken from the library, except when properly charged out for overnight use.

Name

Date

